84-856

No. _____

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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented for Review

Congress provided in the Communications Act of 1934 for the division of communications jurisdiction between the federal government and the states. The degree of federal jurisdiction depends on the extent of the common carriers' participation in interstate communications. "Connecting carriers," those involved in interstate communications solely through physical connection with the facilities of another carrier, are subject to only limited federal jurisdiction, 72 USC §152(b). Against this background, the question presented is:

Does the Federal Communications Commission have the statutory authority under the Communications Act of 1934 to require connecting carriers' subscribers to pay fees in accordance with its end user access charge plan?

Parties

Petitioner, the New York State Department of Public Service, incorporates by reference the parties to the proceeding before the U.S. Court of Appeals for the District of Columbia listed in the Petition for a Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners (NARUC).

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NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

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vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The New York State Department of Public Service (hereinafter "NYDPS") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit") entered on June 12, 1984. The Suggestion for Rehearing *en banc* of Intervenor, U.S. Telephone, Inc. and the Petition for Rehearing of said intervenor were denied on August 23, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia is attached as Appendix A to the National Association of Regulatory Utility Commission's (hereinafter "NARUC") Petition for a Writ of Certiorari and is reported at 737 F.2d 1095 (D.C. Cir. 1984). The Orders of the Court denying the Petition for Rehearing and the Suggestion for Rehearing *en banc* are attached hereto as Appendix A. The Federal Communications Commission's (hereinafter "FCC") access charge order is reported at 93 FCC 2d 241 (1983). Its order on initial reconsideration is reported at 48 Fed. Reg. 42, 984 (1983). Its order on further reconsideration is reported at 49 Fed. Reg. 7810 (1984). The NARUC filed one complete set of the FCC's orders with the clerk of this court on July 18, 1984.

Jurisdiction

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on June 12, 1984. A Rehearing and a Rehearing *en banc* were sought by Intervenor, U.S. Telephone, Inc. and were denied by the D.C. Circuit on August 23, 1984. This petition has been filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations

The full text of relevant statutory provisions are set forth in Appendix B.

Statement of the Case

Petitioner NYDPS adopts and incorporates by reference the Statement of the Case set forth by the NARUC in its Petition for Certiorari dated July 18, 1984. The NYDPS also makes the following additions to that statement.

In order to implement its plan of recovering interstate NTS costs through flat-rate charges, the FCC ordered the creation of the National Exchange Carriers Association (NECA) which, as its name suggests, was to represent the local exchange companies whose access facilities are used to complete interstate calls. The NECA was to file its own access tariff with the FCC in conformity with the Commission's access charge order.[1] Included in that tariff was to be a provision imposing the FCC-ordered flat-rate end user charge on the local exchange companies' customers (See the FCC's access charge order, 93 FCC 2d 241 (1983)).[2]

Petitioner NYDPS argued below that such assertion of jurisdiction by the FCC over local exchange companies was impermissible under Section 152(b)(2) of the Communications Act of 1934. In particular, the NYDPS pointed out that once divestiture of the Bell System took

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[1] Because of time constraints and because of doubt that the newly-formed NECA would be in a position to file a tariff by October 3, 1983, the initial tariff was to be prepared by AT&T. 93 FCC 2d at 336.

[2] As noted in the NARUC Petition for Certiorari at pp. 5-6, the FCC has since that time deferred implementation of the end user charges for residential and single-line business customers until June, 1985.

place,[3] the local exchange companies comprising the NECA would all be "connecting carriers" as defined in §152(b)(2) of the Communications Act of 1934. As such, they would be subject to only limited federal jurisdiction that would not extend to the imposition of a flat-rate end user charge on their customers.

The D.C. Circuit rejected this argument on June 12, 1984 when it issued its decision affirming the FCC's access charge orders in all major respects. By order of August 23, 1984, the D.C. Circuit denied both a Petition for Reconsideration of its June 12, 1984 decision and a Suggestion for Rehearing *en banc*.

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[3] The divestiture referred to is the reorganization ordered as a result of the antitrust consent decree between AT&T and the United States as set forth in the Modified Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff sub nom, Maryland v. United States*, 103 S. Ct. 1240 (1983).

REASONS FOR GRANTING THE WRIT

A. The FCC Lacks Jurisdiction To Impose An End User Charge On Local Exchange Companies' Customers.

1. Section 152(b)(2) of The Communications Act of 1934 Gives The FCC Only Limited Jurisdiction Over Connecting Carriers.

The Communications Act of 1934 created a federal agency, the Federal Communications Commission, charged with the responsibility of regulating wire and radio communications. In enacting this statute, Congress quite consciously endowed the new federal agency with considerably less regulatory authority *vis-a-vis* the states than its predecessor in telephone communications, the Interstate Commerce Commission, was thought to have. The framers of the 1934 act in particular sought to divide regulatory authority between the federal government and the states in a manner that rejected the application to communications regulation of the so-called "Shreveport Doctrine" enunciated by this Court in *Houston Ea t and West Texas Railway v. United States*, 236 U.S. 342 (1914). 78 Cong. Rec. S 8823 (daily ed. May 15, 1934). See also *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 437 U.S. 874 (1977) (hereinafter "NCUC II"). Under that doctrine, the ICC was permitted to assert jurisdiction over state railroad rates because they allegedly burdened interstate commerce.

Congress did not decide on this allocation of jurisdiction in a vacuum. At the time the 1934 act was being considered, there was very little interstate telephone business. 78 Cong. Rec. S 8822 (daily ed. May 15, 1934). The telephone system then, as now, was used primarily for intrastate calls. Since ninety-seven percent of all calls were intrastate, 78 Cong. Rec. H 10316 (daily

ed. June 2, 1934) the FCC was asserting essentially no jurisdiction over communications. Regulation was being left instead to the states. 78 Cong. Rec. S 8822 (daily ed. May 15, 1934).

Recognizing the inherently intrastate nature of the telephone business as well as the states' traditional regulatory role, Congress opted not to endow the federal communications regulator, the FCC, with unfettered jurisdiction. Thus, as the court correctly analyzed in NCUC II, Congress sought to deny to the FCC the kind of jurisdiction over local communications rates which the ICC was permitted by virtue of the Shreveport Doctrine to assert over local railroad rates. 552 F.2d at 1047.

Congress's mechanism for limiting the FCC's regulatory authority and reserving it instead to the states in Section 152(b). This Section states in pertinent part:

> Subject to the provisions of §301 of this title, nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier, or (2) any carrier engaged in intrastate or foreign communications solely through physical connection with the facilities indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . except that §§201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Thus, in §152(b), Congress varied the degree of federal jurisdiction with the extent of the carriers' involvement in interstate business. The continuum of federal versus state jurisdiction it set forth was the following. With respect to the Bell system, that is carriers that

performed both interstate and intrastate services, the FCC had jurisdiction over the carriers' interstate business and the states had jurisdiction over the carriers' intrastate business. With respect to the independent carriers, the so-called "connecting carriers," the FCC was only given authority to the extent that Sections 201-205 of the Act were made "applicable" to them.

2. The Local Exchange Companies On Whose Customers The FCC Seeks To Impose The End User Charge Are "Connecting Carriers".

When Congress enacted the 1934 Act, the telephone system it had before it consisted of the Bell system (AT&T and its subsidiaries) and a host of small, independent companies that were related to the interstate system, if at all, solely by virtue of their physical connection to carriers in that system. *Hearings on HR 8301,* 73rd Cong., 2d Sess. 239-40, 250-58 (1934). These independent companies, as Senator Clark, sponsor of the amendment that with modification[4] became Section 152(b) said were "entirely local affairs." 78 Cong. Rec. S 8846 (daily ed. May 15, 1934). And as Senator Dill explained, on the occasion of the introduction of Senator Clark's amendment, its adoption was consistent with the remainder of the bill because "its purpose is to accomplish that which we have tried to do throughout the bill that is, *to protect the independent companies.*" 78 Cong. Rec. S 8847 (daily ed. May 15, 1934) (emphasis added).

With divestiture, the nature of companies classified as connecting carriers has changed in some respects. No longer are these independent connecting carriers small,

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[4] The modification involved addition of the clause, discussed *supra*, making §§201-205 applicable to connecting carriers.

family-run operations, 78 Cong. Rec. S 8846 (daily ed. May 15, 1934), they include now all of the former Bell subsidiaries that performed local exchange service.

But the basic intrastate nature of these connecting carriers' business has not changed. In fact, under the terms of the antitrust consent decree incorporated in the MFJ, the local exchange companies are precluded from engaging in interstate business and have no relationship with interexchange carriers other than through the physical connection of their lines. 552 F.Supp. at 227.

Since by the terms of the consent decree, these local exchange companies cannot perform interexchange service and since AT&T no longer has the "power to control the functions of the [local exchange companies]" *Rochester Telephone Corporation v. United States*, 307 U.S. 125 at 145 (1938), these companies must be treated as connecting carriers under the terms of Section 152(b)(2) of the 1934 Act. As such, they are subject to only that degree of regulation by the FCC that the framers of the 1934 Act envisioned would apply to the independent telephone companies of the 1930's.[5]

3. The FCC's Jurisdiction Over Connecting Carriers Extends Only To Regulation Of Transactions Between Connecting Carriers And Interstate Carriers That Affect The Conduct Of Interstate Business.

As noted *supra*, the only jurisdiction given to the FCC over connecting carriers is that contained in the proviso in §152(b) making §§201-205 applicable to such carriers. Sections 201-205 authorize the FCC to ensure that an interstate system is maintained through physical

[5] While it might be argued that this change in the nature of the communications system warrants a change in the regulatory structure, as discussed *infra*, that is a matter for Congress, not this Court to decide.

connection (§201), that discrimination in the provision of communications service does not take place (§202), that tariffs are filed by interstate carriers (§203), that those filings are investigated (§204) and that just and reasonable rates are set (§205).

Under this regulatory scheme, with respect to access, the FCC can order connecting carriers to provide access to interstate carriers. *North Carolina Utilities Commission v. FCC*, 537 F.2d 287 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter "NCUC I"); *NCUC II, supra; Lincoln Telephone and Telegraph Company v. FCC*, 659 F.2d 1082 (D.C. Cir. 1981). It can set the rates that connecting carriers charge interexchange carriers for access to the local exchange. And it can take steps to insure that those rates are not discriminatory.[6] It has the authority to determine the rates that interexchange carriers must charge to insure that the interstate access costs are covered. And it has the authority to determine that the interstate carriers should recover those costs on a flat-rate basis if it so desires.

What it does not have the authority to do, however, is to order a connecting carrier to file a tariff, 47 U.S.C. §203, and to prescribe the rates that carrier charges its own customers. Yet, that is precisely what the FCC seeks to do here. Contrary to §203, the FCC is seeking to require local exchange companies, through the NECA, to file an access tariff and to dictate the end user rates in that tariff.

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[6] That is why, although connecting carriers are not obligated to file their tariffs with the FCC, the interexchange companies are required to include connecting carriers' tariffs in their own filings. This permits the FCC to investigate the connecting carriers' practices as they affect transactions with the interstate carriers.

The issue is not whether the FCC has unfettered jurisdiction to impose flat-rate as opposed to usage-sensitive charges for interstate toll service. It does. The issue is whether it can order intrastate companies to file tariffs containing end user rates dictated by the FCC. It cannot.[7]

Nonetheless the D.C. Circuit read Sections 201-205 to mean that the FCC had full, unfettered jurisdiction over the rates connecting carriers charged their own customers where those rates are designed to recover interstate costs. But such a reading of the statute is incorrect. Obviously, Congress intended the FCC to have *less* jurisdiction over the connecting carriers than it did over the Bell system. Otherwise, it would simply have made §152(b)(1), the provision denying the FCC jurisdiction over intrastate business, applicable to connecting companies as well.

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[7] In other words, the FCC's jurisdiction over connecting carriers stops before it gets to the door of the connecting carriers' customers. The FCC can regulate the terms of the transactions between interexchange and connecting carriers. It can determine what costs connecting carriers can recover for providing interstate carriers access to the local exchange. But, it cannot spare interexchange carriers (and their customers) from having to pay for these services by ordering the connecting carriers to cover the costs by charges to their own customers.

The D.C. Circuit below accepted the FCC's argument that by virtue of their having access to the interstate system (whether or not they actually used the system), all of the local exchange companies' customers were in fact interstate customers subject to FCC jurisdiction. But there is nothing in the legislative history to support such an expansive reading of the FCC's jurisdiction. Indeed, quite the contrary, if the FCC is correct, one wonders why Congress took such care to treat separately the FCC's jurisdiction over carriers "engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier..." 47 U.S.C. §152(b)(2).

Congress's separate treatment of connecting carriers in Section 152(b)(2) must mean that even with respect to that aspect of a connecting carrier's operation that is *related* to the conduct of interstate business, *i.e.* the physical interface between the interstate facilities and the local exchange facilities, the FCC's jurisdiction is sharply limited. And such an interpretation is entirely consistent with the framers' perception that connecting carriers were self-contained intrastate units with the exception of those points at which they interfaced with interstate carriers. It was only those transactions between connecting and interstate carriers, occurring at the points of physical interconnection, which could have necessitated FCC jurisdiction because they had a direct bearing on the carriers' ability to provide interstate service.[8]

The D.C. Circuit below gave an overly broad reading to §§201-205, thereby violating the fundamental principle that " 'the federal-state balance' will not be disturbed unintentionally by Congress or *unnecessarily by the courts.*" *Jones v. Rath Packing Co.*, 430 U.S. 519 at 525 (1976) (emphasis added, citations omitted). Unless a clear and manifest intent of Congress to preempt the states is shown, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Jones v. Rath Packing Co., supra; Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), it is only those state practices not reconcilable with the

[8] With respect to the Bell system, however, because of the complex integration of its intrastate and interstate services, Congress obviously felt the FCC needed more complete jurisdiction over the interconnection transactions between the interstate and intrastate segments of the Bell system. Otherwise, through paper transactions, the interexchange carriers might be able to frustrate FCC regulation of interstate telephone business.

attainment of federal regulatory goals which must give way. Here, there is no clear and manifest intent of Congress to preempt the states in regulating the telephone rates their intrastate customers pay. To the contrary, the framers of the 1934 Act sought to protect the independent companies that provided local service to these customers. Nor is this an instance where federal and state practices cannot be reconciled. As noted *supra*, if the FCC needs to move to a flat-rate charge for interstate access services, it can do so without taking the draconian step of ordering intrastate exchange companies to collect interstate fees from their customers.

4. The Primary Cases Relied On By The Court Below Do Not Support The FCC's Assertion Of Jurisdiction To Impose End User Charges On Local Exchange Companies' Customers.

The primary cases relied on by the D.C. Circuit, *NCUC I* and *II* and *Computer and Communications Industry Association v. FCC*, 693 F.2d 1981 (D.C. Cir. 1982), *cert. denied*, _____ U.S. _____, 103 S. Ct. 2109 (1983) (hereinafter "Computer II") do not support the FCC's assertion of jurisdiction to impose end user charges on local exchange companies' customers.

NCUC I and *II* addressed the FCC's jurisdiction to set conditions governing the interconnection of terminal equipment to local exchange companies' lines and to the interstate telephone network. The Court of Appeals for the Fourth Circuit (Fourth Circuit) concluded that since terminal equipment was used for both interstate and intrastate calls and could not physically be severed, state regulation must yield to federal regulatory goals. It simply was not physically possible to have two different sets of rules for the interconnection of terminal equipment depending upon whether that equipment was used for interstate or intrastate calls. As the Fourth

Circuit in *NCUC II* said in explaining the rationale for its earlier decision in *NCUC I*, "[s]omething had to give." 552 F.2d at 1043.

In the instant case, nothing has to give. The separation of "local loop" costs between interstate and intrastate jurisdictions is a process that has been going on for at least fifty years in accordance with the requirements set forth in *Smith v. Illinois Bell*, 282 U.S. 133 (1930). Once the assignment of costs has been made, the FCC can determine how it wants the costs assigned to the interstate jurisdiction to be covered. Similarly, the states can determine how the intrastate costs are to be covered. One jurisdiction (the FCC) can decide to impose flat-rate, non-usage sensitve charges. Another (the states) can opt for just the opposite rate structure. But what neither can do is impose those costs on each other's ratepayers.

Computer II was also a case of the FCC asserting jurisdiction over non-severable physical facilities. The issue was whether the FCC could order the de-tariffing of customer premises equipment (CPE) on the federal as well as the state level. As the Court of Appeals for the Second Circuit pointed out in Computer II, "the federal-state conflict would stem as it did in the NCUC cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely." 693 F.2d at 216.[9]

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[9] It should be pointed out that Computer II did not even address the Commission's authority to exercise its Title II common carrier jurisdiction in the face of conflicting state regulations. Rather it addressed the Commission's authority to forego regulating under Title II versus the states' authority to continue similar regulations of their own. 693 F.2d at 207-208.

There is no unavoidable conflict in the instant case. If the FCC believes flat-rate charges, as opposed to usage-sensitive charges will accomplish its goal, it is free to order such a rate structure for its *own* interstate users. But under §203, it cannot order intrastate connecting companies to file a tariff, let alone dictate what charges that tariff must impose on the connecting carrier's local ratepayers.

B. This Case Is Of Critical National Importance Because The Statutory Framework Of Dual State-Federal Communications Regulation Is In Danger Of Being Made Meaningless In The Post-divestiture Environment.

Over the past ten years, the FCC has attempted to assume increasing jurisdiction over intrastate telecommunications practices. And it has done so despite the fact that Congress has adopted no amendments to change the statutory scheme of the Communications Act of 1934.

As noted *supra* in *NCUC I* and *II*, the FCC successfully sought to remove telephone company restrictions on the interconnection of non-carrier-supplied terminal equipment used in both intrastate and interstate calling; in *Computer II*, as discussed *supra*, the court upheld the FCC's authority to deregulate customer premises equipment by forbidding carriers from offering such equipment as part of transmission service; in *Puerto Rico Telephone Company v. FCC*, 553 F.2d 694 (1st Cir. 1977), the court upheld the FCC's determination that the Puerto Rico Telephone Company could not refuse to connect privately supplied private branch

exchange (PBX) equipment[10] to its telephone network; in *New York Telephone Company v. FCC*, 631 F.2d 1059 (2nd Cir. 1980), the court upheld FCC jurisdiction over charges for foreign exchange (FX)[11] and common control switching arrangement (CCSA)[12] services for intrastate customers.[13]

Such assertion of preemptive jurisdiction by the FCC took place in an environment where the integrated Bell system was the significant force in both interstate and intrastate markets. Whether the FCC's actions in that context represented an appropriate extension of federal jurisdiction over a major interstate actor or rather an impermissible revision of Congress' mandate to avoid application of the Shreveport Doctrine can be, and has been, debated at great length.

But the issues raised in the instant proceeding transcend that debate for three reasons. First, we are for the first time in the instant case faced with FCC preemption of the states' jurisdiction even though such preemption is not necessitated by incompatible state action. Second, we are for the first time faced with FCC

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[10] PBX systems are self-contained telephone systems used by a customer for internal communications (such as intra-office or intra-hotel systems) which contain switching capacity to link the customer's internal system with the rest of the telephone network.

[11] FX services permit the leasing of full-time point-to-point (*i.e.* dedicated) private line channels which permit a customer in one city to obtain local exchange service in another city without incurring a toll charge.

[12] With CCSA, a large customer with a network of private lines can dial all stations in the network or dial off-network through interconnections with local exchange services, FX or WATS lines.

[13] Just recently, in *Virginia State Corporation Commission v. FCC and United States of America*, 732 F.2d 388 (4th Cir. 1984), the Fourth Circuit upheld FCC jurisdiction to prescribe depreciation rates and methods for classes of property used by telephone companies. Petitions for *certiorari* are expected in this case as well.

preemption of state jurisdiction over *rates* paid by local exchange customers. And third, with divestiture, the nature of the telecommunications market has changed drastically such that the local exchange companies over whose customers the FCC seeks to assert jurisdiction are no longer affiliated with an integrated, interstate telecommunications concern.[14]

In all of the cases cited above, the court found that incompatible state regulation necessitated federal preemption. Here, in the absence of any incompatible state regulation, the FCC nevertheless asserted jurisdiction over intrastate companies. And it did so to an unprecedented degree because it sought to impose a fee directly on local customers. In none of the cases referred to above did the FCC assert jurisdiction over the rates paid by customers of local exchange companies.

Not only does the FCC seek to extend its authority in this case in an unprecedented manner, over the rates paid by local companies' customers, it chooses to do so at the same time that the local exchange companies are no longer simply local subsidiaries of a single homogenous interstate network. By virtue of the antitrust consent decree, they are now totally independent of that network except for the fact that their physical facilities connect with those of interstate carriers. They are in the exact same position as the independent telephone companies which Congress decided in 1934 should be subject to only limited federal jurisdiction. Until Congress amends the Communications Act of 1934, which is certainly its prerogative, they should be regulated as such.

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[14] In many of the same respects, the Fourth Circuit's recent decision in the *Virginia State Corporation Commission* case represents a similarly significant departure from past precedents.

Conclusion

For the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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DATED: November 20, 1984

APPENDIX A

Order Denying Suggestion for Rehearing *en banc*

United States Court of Appeals
For the District of Columbia Circuit
Filed Aug 23 1984
George A. Fisher
Clerk

Received
Aug 28 19____
Public Service Commission
Office of Counsel

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 83-1225.
September Term, 1983.

National Association of Regulatory
Utility Commissioners,

Petitioner,

v.

Federal Communications Commission
and United States of America,

Respondents.

Ad Hoc Telecommunications Users Committee *et al.*,

Intervenors.

And Consolidated Cases

Appendix A—Order Denying Suggestion for Rehearing en banc.

BEFORE: Robinson, *Chief Judge;* Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, *Circuit Judges,* and MacKinnon, *Senior Circuit Judge*

ORDER

The Suggestion for Rehearing *en banc* of Intervenor, U.S. Telephone, Inc. has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*
BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wright, Wald, Edwards, Scalia and Starr did not participate in this order.

Order Denying Petition for Rehearing

United States Court of Appeals
For the District of Columbia Circuit
Filed Aug 23 1984
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
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Federal Communications Commission
and United States of America,

Respondents.

Ad Hoc Telecommunications Users Committee *et al.*,

Intervenors.

And Consolidated Cases

BEFORE: Wilkey and Ginsburg, *Circuit Judges*, and
MacKinnon, *Senior Circuit Judge*

Appendix A—Order Denying Petition for Rehearing.

ORDER

On consideration of the Petition for Rehearing of Intervenor U.S. Telephone, Inc. filed July 23, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*
BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

Statutory Provisions

STATUTES & REGULATIONS

47 U.S.C. §152(b)

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

(As amended Feb. 21, 1978, Pub.L. 95-234, §5, 92 Stat. 35.)

Appendix B—Statutory Provisions.

47 U.S.C. §201

§201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not

contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, §201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

47 U.S.C. §202

§202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, §202, 48 Stat. 1070; Sept. 13, 1960, Pub.L. 86-751, 74 Stat. 888.

47 U.S.C. §203

§203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require. June 19, 1934, c. 652, Title II, §203, 48 Stat. 1070

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(As amended Aug. 4, 1976, Pub.L. 94-376, §1, 90 Stat. 1080.)

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation of order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, §203, 48 Stat. 1070.

47 U.S.C. §204

§204. Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the

proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

(As amended Aug. 4, 1976, Pub.L. 94-376, §2, 90 Stat. 1080.)

Appendix B—Statutory Provisions.

47 U.S.C. §205

§205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. June 19, 1934, c. 652, Title II, §205, 48 Stat. 1072.

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Nos. 84-816, 84-824, 84-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

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LIST REQUIRED BY RULE 28.1

The list required by Rule 28.1 may be found in MCI's August 17, 1984, Brief In Opposition to the petition for certiorari filed by the National Association of Regulatory Utility Commissioners, No. 84-95.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-816, 84-824, 84-856

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
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v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

Pursuant to Rule 22.1 of the Rules of this Court, respondent MCI Telecommunications Corporation ("MCI") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission, No. 84-816; the Florida Public Service Commission, No. 84-824; and the New York Public Service Commission, No. 84-856.

LIMITED PURPOSE OF THIS OPPOSITION

The petitions for certiorari in Nos. 84-816, 84-824 and 84-856 seek review of the D.C. Circuit's decision to uphold the FCC's end-user access charge plan. Many of the issues raised by the instant petitions were previously raised by the petitions filed in Nos. 84-95 *(National Association of Regulatory Utility Commissioners v. FCC)* and 84-504 *(National Association of Utility Consumer Advocates, et al. v. FCC)*. MCI opposed those earlier petitions in a Brief in Opposition filed on August 17, 1984 in No. 84-95.[1] MCI relies on the statement of the case and the argument made in that brief to oppose the instant petitions. Petitioners Wisconsin (No. 84-816) and New York (No. 84-856), however, have raised a new issue concerning the authority of the FCC to prescribe end-user access charges for "connecting carriers." This brief in opposition is directed to that issue.

STATEMENT OF THE CASE

MCI adopts the statement of the case presented in its Brief in Opposition, filed on August 17, 1984, in No. 84-95, *National Association of Regulatory Utility Commissioners v. Federal Communications Commission and United States of America, et al.*

SUMMARY OF THE ARGUMENT

There is no difference between the Commission's authority to order end-user charges for connecting carriers and its authority to order such charges for other carriers. Both connecting and non-connecting carriers are expressly subject to Section 205 of the Communications Act which provides ample authority to prescribe end-user charges.

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[1] MCI also relied upon that brief in opposing the petition filed in No. 84-504.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO PRESCRIBE END-USER CHARGES FOR CONNECTING CARRIERS

The Commission decided that all exchange telephone companies should use end-user charges to recover a substantial portion of the costs of non-traffic sensitive subscriber equipment allocated to the interstate jurisdiction. Petitioners allege that some exchange telephone companies are "connecting carriers" under the Communications Act[2] and that the Commission lacks authority to order such carriers to utilize end-user charges. The attempted distinction between end-user charges for connecting carriers and other carriers lacks merit. While "connecting carriers" are exempt from some of the provisions of the Communications Act, they are nevertheless expressly subject to the very provisions upon which the agency relied to order end-user charges.

Pursuant to Section 2(b) of the Act, 47 U.S.C. § 152(b), connecting carriers are expressly made subject to Sections 201 through 205, 47 U.S.C. §§ 201-205.[3] These sections generally provide that carriers shall furnish service upon reasonable request and that their charges and practices will be just and reasonable (Sec. 201); that it

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[2] "Connecting carriers" are carriers that are engaged in interstate or foreign communication solely through physical connection with the facilities of another unrelated carrier. *See* Sections 2(b) and 3(u) of the Communications Act, 47 U.S.C. §§ 152(b) and 153(u).

[3] Section 2(b), 47 U.S.C. § 152(b), states:

> ". . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . *except that sections 201 through 205 of this Act, both inclusive, shall except as otherwise provided therein, apply to carriers described in clauses (2), (3) and (4).*" (emphasis supplied)

shall be unlawful for any carrier to make unreasonable discrimination in charges (Sec. 202); that every carrier, except connecting carriers, shall file tariffs (Sec. 203); that the Commission may hold hearings upon the lawfulness of charges and practices (Sec. 204); and that the Commission after full opportunity for hearing may prescribe just and reasonable charges, classifications, regulations and practices. The Commission relied upon these sections of the Act, especially Section 205, to prescribe the end-user charges here at issue. *MTS and WATS Market Structure*, 93 FCC 2d 241, 254 *et seq.* (1983). Accordingly, the Commission's authority to prescribe end-user charges for connecting carriers under Section 205 of the Act stands on the same footing as the agency's authority to prescribe end-user charges for any other carrier. Because it could prescribe the use of such charges for non-connecting carriers,[4] it could also prescribe such charges for connecting carriers.

The only possibly arguable limitation upon the Commission's authority to prescribe end-user charges for connecting carriers is that Section 203 does not require that connecting carriers file tariffs with the Commission as it does for other carriers.[5] But Section 203 also does not prohibit the filing of tariffs by connecting carriers. It merely does not, of itself, mandate such filing. Section 203 envisions that the charges of connecting carriers for

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[4] *See* MCI's October 17, 1984, Brief in Opposition, filed in *NARUC v. FCC*, No. 84-95.

[5] Wisconsin asserts that connecting carriers are not subject to Section 201(a), citing *United Tel. Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977). That case, however, holds exactly the opposite. As stated by the court, Section 201 is inapplicable only if a carrier removes its interconnection with an interstate company and thereby removes itself from the connecting carrier class: "United and Carolina are free to remove their interconnection with Southern Bell and thereby also remove themselves completely from the jurisdiction of the Commission." 559 F.2d at 724. No telephone company carriers have chosen to remove their interconnection with the interstate network in this case.

interstate communications will be reflected in the tariffs of other carriers. As the court below stated, "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205." 737 F.2d at 1115, n. 23. Even if the Commission's authority under Section 203 were somehow limited by Section 203's connecting carrier exception, its authority under Section 205 to prescribe rates is not limited, and it is that section under which the substantive requirements of the agency decision were ordered. Section 205 explicitly authorizes the prescription of charges, classifications, regulations and practices for all carriers. The incorporation of these substantive prescriptions into the vehicle of a tariff is a derivative matter, falling within the agency's general authority to conduct its business according to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). The Commission's authority to require connecting carriers to file access tariffs under Section 4(i), 47 U.S.C. § 154(i)—in spite of the language in Section 203—is well established. *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981). Moreover, in the decision below, the Commission left "connecting carriers," if any exist, with options other than the filing of tariffs of their own.[6]

Not only are petitioner's arguments without basis in law, they rest upon a factual premise not established below. Neither the agency, nor the court below, addressed the issue of what carriers, *if any*, are connecting carriers in view of the emerging competition in the telecommunications industry. *Compare Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939) (reviewing Commission's finding concerning connecting carrier status after

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[6] The FCC provided that, through a tariff pooling arrangement, carriers could file common tariffs. 93 FCC 2d 325-333. In this way, the rates of connecting carriers would not necessarily be reflected in tariffs of their own, but in tariffs filed together with carriers not classified as connecting carriers.

full hearing before the Commission). Moreover, the accuracy of petitioner's premise is certainly not apparent.[7] Until the agency determines what carriers, if any, may be properly classified as "connecting carriers" in the aftermath of the divestiture of AT&T, the issue raised by petitioners lacks a firm foundation in fact and thus is purely hypothetical and therefore should not be reviewed by the Court. *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974).

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[7] Local exchange telephone companies are now engaged in interstate communications through the offering of interstate access service. The vast array of interstate access services, which the local carriers offer, directly and significantly affect the quality and the type of interstate communication that can be transmitted and makes those carriers active and integral parts of the interstate network. Moreover, the physical connections in question are not solely connections with carriers, as required in Section 152(b) to qualify for classification as connecting carriers, but are also connections with private companies with their own private interstate facilities and networks not offered for public use. 737 F.2d at 1131.

Not only are heretofore local companies actively engaging in interstate communication through the offering of interstate access services, they are also actively operating interstate networks. GTE, which owns local telephone companies throughout the country, purchased the facilities of Southern Pacific Communications Corporation, and is the third largest interstate common carrier. *Application of GTE and SPCC and SPSC*, 94 FCC 2d 235 (1983). United Telephone Company, an owner of local exchange companies, has purchased U.S. Telephone, Inc. and now operates interstate circuits. *United Telecommunications, Inc. and U.S. Telephone, Inc.*, 56 Rad. Reg. 2d (P&F) 574 (1984). Any number of other local telephone companies have become interstate resellers by leasing the lines of other carriers. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 FCC 2d 554 (1983). The number of such companies cannot be determined because the FCC requires neither certificates of convenience and necessity nor tariffs for such resellers. *Id.* Even the BOCs own and operate some interstate circuits under the exceptions to the MFJ permitted by the U.S. District Court. *U.S. v. Western Electric Co.*, 569 F. Supp. 1057, 1100, 1107 (D.D.C. 1983).

CONCLUSION

For the reasons set forth above, and in MCI's August 17, 1984 Brief filed in No. 84-95, MCI respectfully requests that the petitions for certiorari in Nos. 84-816, 84-824, and 84-856 be denied.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

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January 7, 1985

APPENDIX

STATUTORY PROVISIONS

The text of Section 2(b) and Sections 201-205 of the Communications Act, 47 U.S.C. §§ 152(b), 201-205, may be found in the appendix of the petition for certiorari in No. 84-856. The text of Section 3(u) of the Communications Act, 47 U.S.C. § 153(u) may be found in the appendix of the petition for certiorari in No. 84-816.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i) states:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(3) (3) (3)

Nos. 84-816, 84-824, 84-856

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IN THE

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FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED *

1. This Court ruled in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that, under the statutory antecedents to the Communications Act of 1934, local telephone exchange costs must be apportioned between those attributable to interstate service and those attributable to intrastate or local service. The Federal Communications Commission issued orders setting guidelines for the manner in which such costs, once allocated to interstate service, are to be recovered. To recover a portion of these costs, the guidelines would impose charges on end users who receive access to interstate service through the local exchange. Did the court below affirm the Commission's orders consistently with *Smith*?

2. Did the court below correctly decide that the Commission had jurisdiction to require local telephone companies to impose charges on their subscribers for re-

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* The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

Each of the foregoing Bell Operating Companies is a wholly owned subsidiary of a Bell Regional Holding Company, that is, American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group or Southwestern Bell Corporation. Each Regional Holding Company has outstanding securities in the hands of the public.

covering the costs the companies incur to provide their subscribers access to the interstate telephone network?

3. The court below determined that the Commission's decision to issue rules requiring access charges was not unlawful, arbitrary or unreasonable. Did the court below properly make that determination and affirm the Commission's decision on the basis of that standard?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-816, 84-824, 84-856

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

The Bell Operating Companies, Respondents here, intervened below in the Court of Appeals for the District of Columbia Circuit in support of the Federal Communi-

cations Commission. Respondents submit this Brief in Opposition to the Petitions for Writs of Certiorari to review the Court of Appeals' decision filed by Petitioners the Florida Public Service Commission, the New York State Department of Public Service, the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission.

STATEMENT OF THE CASE

The Federal Communications Commission determined in a series of orders to establish guidelines for new charges to recover the costs incurred by local telephone exchange companies in providing access to the interstate telephone network.[1] Among the charges the Commission required was a monthly "access charge" to be imposed by telephone exchange companies on their subscribers to cover partially the cost of providing these end users access to interstate service. The Court of Appeals unanimously affirmed the Commission's decision to impose the end user access charge.[2]

Petitioners challenge the Court of Appeals' decision on three general grounds. They contend first that it is inconsistent with the jurisdictional division set forth in the statutory antecedents to the Communications Act of 1934, as this Court construed them in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[3] Related to

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[1] The Commission's *Third Report and Order*, its initial access charge order, is reported at 93 F.C.C.2d 241 (1983). The Commission subsequently modified this order on reconsideration, 48 Fed. Reg. 42,984 (1983), and on further reconsideration, 49 Fed. Reg. 7810 (1984).

[2] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). In other respects, the Court of Appeals affirmed the Commission's orders in principal part, remanding for further consideration two limited aspects of the orders irrelevant to the issues here.

[3] Fla. Pet. at 9-10, 21; N.Y. Pet. at 13.

this jurisdictional claim are further claims that the court incorrectly ruled the Commission's actions were within the jurisdictional limitations set forth in Sections 2(b)(1) and 221(b) of the Communications Act, 47 U.S.C. §§ 152(b)(1), 221(b), which prohibit Commission regulation of intrastate matters,[4] and Section 2(b)(2), 47 U.S.C. § 152(b)(2), which Petitioners claim precludes Commission jurisdiction to require local exchange operating companies to impose access charges.[5] Finally, Petitioners contend that the court should have invalidated the Commission's decision as discriminatory and unreasonable.[6]

Petitions to review the decision below have already been filed by the National Association of Regulatory Utility Commissioners in No. 84-95 and the National Association of State Utility Consumer Advocates in No. 84-504. Respondents briefly set forth here a statement of the case necessary for addressing the questions the new state Petitioners present. A more detailed statement pertinent to this case is set forth in Respondents' Brief in Opposition to the NARUC Petition.

The interstate costs whose means of recovery is the subject of Petitioners' challenge include essentially the costs of installing and maintaining the so-called telephone subscriber "loop." The loop primarily consists of the line connecting a telephone subscriber to the central office. Through this line, the subscriber may make or receive local calls or long distance calls. The costs of providing and maintaining the loop are not traffic sensitive. That is, they do not depend on the volume or frequency of calls made over the loop.

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[4] Wis. Pet. at 18-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7, 14-16.

[5] Wis. Pet. at 11-18; N.Y. Pet. at 7-12.

[6] Fla. Pet. at 17-26.

Through the jurisdictional "separations" process established under Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), these non-traffic sensitive ("NTS") costs are allocated between the interstate jurisdiction of the Commission and the intrastate jurisdiction of the states. There is no dispute in this case that this allocation is required by this Court's decision in *Smith v. Illinois Bell Telephone Co.*; nor is there any dispute about the method the states and the Commission use to allocate these NTS costs. Rather, the dispute here is about how the Commission may go about imposing charges for recovering the NTS costs allocated to its jurisdiction.

For many years, these interstate NTS costs have been recovered through long-distance charges made on a usage basis depending on time and distance. Heavy interstate users, therefore, paid many times the interstate portion of their loop costs, while light users—whose loops cost just as much to maintain—paid only a small fraction of the same costs.

Petitioners contend that the charges necessary to recover interstate NTS costs may only be imposed when interstate calls are actually made. The Commission, however, determined to impose a charge on each subscriber to recover the NTS costs actually incurred to provide that subscriber access to the interstate telephone network. The fundamental purpose of the Commission's plan was to shift cost burdens to persons who caused them and to eliminate the unfairness of existing recovery methods for interstate NTS costs.[7]

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[7] Persons actually making interstate calls, however, would continue to be charged to recover traffic sensitive costs, that is, costs that are a function of the calls actually made. They would also pay some NTS costs passed on to them by interstate carriers, who are subject to a charge for their access to the local exchange that is not at issue here.

The Commission, in making its determination, sought to balance four objectives and arrive at a result that would be in the public interest. It sought to ensure universal telephone service, that is, service at costs affordable to all. It sought to eliminate discrimination through unjustifiable differences in charges. It sought an allocation of costs that would encourage economic efficiency in the interstate telephone network. Finally, it sought to avoid interstate charges so high as to encourage large volume users to avoid or "bypass" the local exchange, placing them beyond the reach of the exchange's interstate charges and thereby increasing the interstate charges for those subscribers remaining on the exchange.[8]

Taking these objectives into consideration, the Commission decided that a portion of the total NTS costs under its jurisdiction should be recovered by a flat-rate, rather than usage-based, access charge imposed on each telephone subscriber line. The end user access charge in effect reflects some, but not all, of the cost of each subscriber's loop that has been incurred to make interstate service available to that subscriber. Not only would this approach more equitably place costs on the cost causer, the Commission reasoned, but also it would allow interstate toll rates to be lower than they otherwise would have to be, thus reducing the risk of bypass of the local exchange.

The universal service objective, however, required the Commission to temper the implementation of its end user access charge approach and allow end users time to adjust to the effects of fully recovering NTS costs

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[8] Where short-haul communications links, such as microwave systems or private cables, can be obtained at costs less than those incurred under a usage-based rate structure, there is a strong, artificial incentive for high-volume users to bypass the local exchange and connect directly with an interstate carrier by building private communication links between their places of business and the interstate carrier's local "point-of-presence."

through access charges.[9] Thus, the Commission has imposed separate flat-rate access charges for residences (and single line business users) and multiline business users, and in nearly all areas, the two nationwide rates are well below the total interstate NTS costs allocated on a per line basis. Over a period of time, however, increasing amounts of interstate NTS costs may be recovered through gradually increasing the flat rates.[10]

The Commission also undertook to address universal service in two other ways. First, it committed to institute proceedings to define a category of subscribers needing access charge relief. Second, it created a Universal Service Fund. Through this mechanism, a portion of any area's NTS costs above the national average would be distributed for recovery nationwide as an element of access charges also to be imposed on interstate carriers.

The Court of Appeals decided that the Commission's determinations were not unreasonable and that nothing in the Communications Act precluded the imposition of a flat-rate access charge on local exchange subscribers to recover local exchange costs incurred to provide them interstate service. Responding to claims that the end user access charge did not recover interstate costs from the interstate network and effectively repealed the allo-

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[9] "We have . . . concluded that some adjustment in flat end user common line access charges must be made in order to balance the critical need to move towards a rational cost-based pricing system for access plant with the maintenance of universal service." *Third Report and Order*, 93 F.C.C.2d at 291. "[W]e have selected a low residential minimum in order to avoid an adverse effect upon universal service." *Id.* at 292.

[10] The balance of NTS costs not recovered from charges directly on end users will be recovered from the access charges on interstate carriers that are not at issue here. See discussion, *supra*, p. 4 n.7.

cation of costs between the interstate and intrastate jurisdictions, the court reasoned that such claims:

> "confuse or blend two questions: (1) jurisdiction or authority to recover costs; (2) the manner in which costs are to be recovered." 737 F.2d at 1112.

It then ruled that *Smith v. Illinois Bell Telephone Co.* addressed only the first question.

The court acknowledged the *Smith* admonition that "unless an apportionment [of exchange costs] is made, the intrastate service to which the exchange property is allocated will bear an undue burden." [11] The court ruled, however, that this language merely required that costs related to interstate service not be a part of the costs used in calculating the charges for local exchange service. *Id.* at 1112 n.18. It did not preclude recovering interstate costs from the persons for whom they were incurred.

The court also rejected arguments that the access charge was an exercise of jurisdiction over local charges contrary to the prohibitions of Section 2(b)(1) of the Communications Act. In response to claims that the charge was, in effect, a condition of local service, the court reasoned and decided:

> ". . . The end user charge reflects costs caused not by a subscriber's actually making interstate calls, but by the subscriber's connection into the interstate network . . . . [These l]ocal telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of that subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes . . . ." 737 F.2d at 1113-14.
>
> "The scheme advanced by the FCC simply requires all telephone subscribers to pay, on a per line basis, for that portion of *their necessarily-incurred local*

[11] 282 U.S. at 151.

telephone plant costs assigned under *Smith* to the interstate jurisdiction." *Id.* at 1115 (emphasis in original).

Responding to claims that the access charge was an exercise of jurisdiction over "connecting carriers" contrary to the prohibitions of Section 2(b)(2),[12] the court noted Section 2(b) expressly makes connecting carriers subject to Sections 201 to 205 of the Act, 47 U.S.C. §§ 201-05. Section 2(b)(2), therefore, did not preclude Commission prescription of just and reasonable charges under Section 205 if the Commission found connecting carrier interstate rates unlawful, as it did, along with the interstate rates of all other exchange carriers.

Finally, the court held that Section 221(b) was irrelevant to claims that the access charge was in excess of the Commission's jurisdiction. That provision " 'was merely intended to preserve state regulation of local exchanges that happen to overlap state lines.' " 737 F.2d at 1113 n.21, quoting *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) (*"Computer II"*).

SUMMARY OF ARGUMENT

This Court's decision in *Smith v. Illinois Bell Telephone Co.* required only that the costs of operating the local exchange be apportioned between those attributable to interstate service and subject to federal jurisdiction and those attributable to intrastate or local service and subject to state jurisdiction. It did not prescribe how these costs, once apportioned, were to be recovered by the respective jurisdictions. Thus, in upholding the Commission's decision to require a charge to recover these costs from persons for whom they were incurred, the Court of Appeals ruled consistently with this Court's decision in *Smith*.

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[12] *See* 47 U.S.C. § 153(u) (defining the carrier described in Section 2(b)(2) as a "connecting carrier").

Similarly, the court correctly ruled that the Commission's access charge decision did not exceed the Commission's authority under the Act. An increasingly lengthy line of cases, none of which has prompted the need for review here, has rejected the view that Sections 2(b)(1) and 221(b) of the Act preclude Commission regulation of interstate matters that also affect matters of intrastate concern. *See Computer II, supra; North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*"NCUC II"*); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*"NCUC I"*). Because the Commission required the end user access charge to recover costs incurred in providing interstate service, the charge is plainly within the Commission's jurisdiction. Indeed, because the access charge decision neither displaces nor preempts any state regulation, its effect on matters of state concern barely begins to approach the preemptive effects that were nevertheless not a bar to Commission jurisdiction in *NCUC I* and *II* and *Computer II*.

Because Section 2(b) expressly subjects "connecting carriers" to the Commission's authority to prescribe rates under Sections 201 to 205, the court also correctly ruled that the Commission could require local exchange companies to impose access charges, whether or not, under Section 2(b)(2), such companies were connecting carriers not otherwise subject to Commission jurisdiction.

Finally, in response to claims that the Commission's access charge decision was arbitrary and discriminatory, the court carefully examined the Commission's rationale in reaching that decision. Having determined according to the applicable standard of judicial review that the Commission's decision was adequately supported and reasonable, the court properly upheld the Commission's decisionmaking.

In short, the Commission's actions confronted the Court of Appeals below merely with over worn questions of Commission jurisdiction. The court correctly decided these long settled questions and similarly undistinguished questions as to the soundness of the Commission's decision-making. Indeed, though couched as legal issues, the grievance the states press here is really with the allocation of jurisdiction between the Commission and the states that Congress established in 1934 when it enacted the Communications Act. Plainly, this is a legislative matter, and there is, therefore, no need for further review here.

ARGUMENT

I. The Court Below Upheld the Commission's Access Charge Decision Consistently with *Smith v. Illinois Bell Telephone Co.*

The claim that the Court of Appeals ruled inconsistently with this Court's decision in *Smith v. Illinois Bell Telephone Co.* is treated in depth in the Bell Operating Company Respondents Brief in Opposition in No. 84-95. Here, therefore, it is sufficient briefly to note that in *Smith* this Court merely held that that "[t]he separation of the intrastate and interstate property, revenue and expenses" was required for ratemaking purposes. 282 U.S. at 148. Apart from admonishing that "intrastate service" should not be burdened with the costs of interstate service, *id.* at 151, however, *Smith* did not prescribe how costs allocated to interstate service were to be recovered. In particular, it neither set forth guidelines or principles governing rate structures nor defined the persons subject to charges for interstate costs.

The Commission here has determined that, because the local exchange maintains facilities to provide each subscriber interstate service, each subscriber should pay a portion of the interstate NTS costs allocated to the Commission's jurisdiction in accordance with *Smith*. Although

this means that all local exchange subscribers will pay an end user access charge, whether or not they actually make interstate calls, it is nevertheless true that the access charge for interstate NTS costs is in every instance only imposed on persons for whom those costs are incurred and only imposed to recover costs attributable to interstate service. In short, the court below ruled consistently with *Smith* in upholding the Commission's access charge decision.

II. The Court Below Correctly Ruled That the Commission Did Not Exceed Its Jurisdiction in Requiring an End User Access Charge.

In addition to arguing that the Commission's actions were contrary to the jurisdictional principles set forth in *Smith* under the Communications Act's statutory antecedents, Petitioners argue that limitations set forth in Sections 2(b) and 221(b) of the Act have been transgressed.[13] Courts of appeals in several prior cases, however, have already rejected this view without having prompted further review here. The court below also correctly rejected the view, and its actions, therefore, are not worthy of review here either.

A. Sections 2(b)(1) and 221(b) of the Communications Act Do Not Deprive the Commission of Authority To Require End User Access Charges.

Section 2(b)(1) of the Communications Act denies the Commission jurisdiction to regulate "charges . . . for or in connection with intrastate communication service." The access charges challenged here, however, are interstate charges. Although Petitioners, through prodigious efforts at obfuscation, generally claim that the end user access charge is unlawful because it is in reality a local charge

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[13] Wis. Pet. at 19-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7.

that burdens intrastate service with interstate costs, their claims are simply misplaced.[14]

In particular, the access charge is determined solely on the basis of interstate costs, which no one disputes are the subject of Commission jurisdiction. Neither intrastate costs nor the amount of a subscriber's local calling enter into the calculation of the charge. Rather, it is imposed to recover the cost, and only the cost, of making interstate service available. The access charge, therefore, is neither a burden on intrastate service nor a charge for intrastate service.

Claims that the access charge is impermissible because it is not a function of actual use of the local exchange for long distance calling simply sidestep the issue.[15] The charge is still interstate in nature because it is imposed to recover costs that are unavoidably incurred for the purpose of making interstate access available to each local exchange subscriber, whether or not the subscriber actually makes long distance calls.

The access charge is also no more a local charge because it is a condition of local service than local charges are interstate because they are a condition of interstate service.[16] Because the same facilities are used in common to provide local and interstate service, acquisition of one use is unavoidably a condition of acquisition of the other.

To assume, as Petitioners clearly do,[17] that local exchange subscribers are persons subject only to the intrastate jurisdiction of the states and, therefore, are not persons subject to access charges begs the question as to

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[14] Wis. Pet. at 20, 23; Fla. Pet. at 7, 11, 14, 17.

[15] Wis. Pet. at 20.

[16] Wis. Pet. at 21.

[17] *See* Wis. Pet. at 20, 23; Fla. Pet. at 11, 14; N.Y. Pet. at 13, 15-16.

how the Commission's jurisdiction may be exercised to recover interstate NTS costs. To be sure, a local subscriber is subject to intrastate jurisdiction, but the subscriber is also necessarily an interstate subscriber, because, whether or not the subscriber makes interstate calls, the subscriber is afforded interstate access for which costs are incurred.

It is, therefore, a fiction to argue as Petitioners do that the ratepayers of the interstate jurisdiction are persons distinct from intrastate ratepayers. Because the interstate access and local access the local exchange provides are physically inseparable, each local exchange subscriber is also an interstate subscriber subject to interstate charges. The end user access charge, therefore, is not the exercise of jurisdiction over "charges . . . for or in connection with intrastate communication service" that Section 2(b)(1) prohibits.[18]

Were Section 2(b)(1) of the Communications Act construed to limit the Commission to recovering interstate costs from only interstate carriers and their customers, the Commission would be powerless to address matters directly affecting the economic viability of the interstate network and to avoid rate discrimination, even though

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[18] This conclusion is not changed even considering that the Communications Act sought to withhold from the Commission the type of jurisdiction supported by the "Shreveport Doctrine." *See Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914). The "Shreveport Doctrine" sanctioned the exercise of federal authority directly over intrastate rail rates because of the indirect effect that those rates had on interstate rail transportation. *See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 134, 136, 145 (1934); *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155, 156, 179 (1934). The imposition of access charges, however, is not such an exercise of authority. Not only is it the regulation of matters directly affecting interstate commerce, but, indeed, it is the regulation of interstate commerce itself, for the access charge is only an interstate charge.

addressing such matters is among the purposes for which the Commission was created and even though it has long been held that the Commission's powers are extensive enough to permit it to effect the purposes for which it was created.[19]

Among other things, the Commission was created "to make available, so far as possible, . . . a . . . wire . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. More specifically, Section 201(b) of the Act, 47 U.S.C. § 201(b), makes it clear that among the Commission's purposes is the issuance of "such rules and regulations as may be necessary" to ensure that "all charges, practices, classifications and regulations for and in connection with [interstate] communication service [are] just and reasonable." *See also* Section 205, 47 U.S.C. § 205 (authorizing Commission prescription of charges if existing charges are found to be unlawful).

The Commission has determined that the access charge is necessary to protect the economic viability of the interstate system and to permit costs related to interstate service to be recovered from all persons for whose benefit they are incurred, rather than placing a disproportionate share of those costs on some of the persons served by the interstate network. The Commission's access charge decision, therefore, is a perfect example of regulation aimed at ensuring adequate service at just and reasonable charges.

Moreover, the Commission's decision to require an access charge is as necessary to the regulation of the interstate network and as much a matter of interstate concern

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[19] " '[I]n the absence of compelling evidence that such was not Congress' intention . . . [courts should not] prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' " *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

—yet of far less intrastate impact—as its decisions in *NCUC II* and *Computer II*, where the courts have already rejected claims that Commission actions exceeded the limits of Section 2(b)(1).

The Commission's decision in *NCUC II* prohibited state restraints on interconnection of terminal equipment used for both interstate and intrastate communication, but much less for the former.[20] It was upheld notwithstanding claims that this action would significantly impact intrastate ratemaking by permitting increased substitution of private equipment for carrier-provided equipment, in turn reducing revenues and the corresponding amount of money available to subsidize other services and facilities. 552 F.2d at 1048. The Commission's decision in *Computer II* required intrastate detariffing of terminal equipment used for both interstate and intrastate communication. It was upheld despite this preemption of state ratemaking authority. 693 F.2d at 215-16. Just as the courts of appeals in *NCUC II* and *Computer II* correctly rejected claims under Section 2(b)(1) that the Commission had unlawfully intruded on state jurisdiction, without prompting further review here, so the court below correctly rejected the same claims in this case, and further review here is not warranted.[21]

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[20] *See NCUC II*, 552 F.2d at 1044 & n.7.

[21] This Court itself has rejected similar claims under the Federal Power Act. Also respondent to the "Shreveport Doctrine," see discussion, *supra*, p. 13 n.18, that Act prohibits Federal Power Commission regulation of retail (intrastate) electric rates. This Court has unanimously held, however, that the FPC is not precluded from adjusting wholesale (interstate) rates to respond to the problem of a discriminatory relationship between wholesale and retail rates. *See FPC v. Conway Corp.*, 426 U.S. 271 (1976). Notwithstanding the FPC's own contrary arguments, the jurisdictional limitation inspired by reaction to the "Shreveport Doctrine" meant only that the FPC could not set retail rates to remedy the problem. *Id.* at 277.

Section 221(b) is also not a jurisdictional bar to the access charge. The courts of appeals have consistently rejected arguments construing that provision to preclude Commission jurisdiction over exchange services generally. *See Computer II*, 693 F.2d at 216-17; *NCUC II*, 552 F.2d at 1045; *NCUC I*, 537 F.2d at 795. Rather, the clear purpose of that provision is to prevent the Commission from exercising jurisdiction over a local exchange that the Commission would not otherwise be able to exercise but for the fact that the exchange straddles a state boundary. As in *NCUC I* and *II* and *Computer II*, where the states also sought review here, the court below correctly rejected the Section 221(b) claim, and further review is not warranted.

Petitioners' view that Sections 2(b)(1) and 221(b) preclude an end user access charge is an effort to parlay the limited purposes of those statutory exceptions into an emasculation of the regulatory powers specifically granted the Commission to achieve objectives clearly set forth in the Act.[22] The Court of Appeals correctly read the Act not to take with one hand the clear authority that it gives with the other—authority necessary to assure economic viability and just and reasonable charges for interstate communications.

B. The Imposition of Access Charges Through "Connecting Carriers" Is Within the Commission's Authority Under the Communications Act.

Petitioners also claim that the end user access charge exceeds the limitation of Section 2(b)(2) of the Act, which precludes the Commission from exercising jurisdic-

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[22] "Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms." *Rochester Tel. Corp. v. United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (construing Section 2(b)).

tion with respect to "any carrier engaged in interstate . . . communications solely through physical connection with the facilities of another [unaffiliated] carrier . . . ." They argue that because local exchange carriers, particularly after the divestiture required by the AT&T antitrust consent decree, cannot engage in interexchange activities, they are "connecting carriers" under Section 2(b)(2) whom the Commission may not require to impose access charges.

It is not necessary to decide, however, whether the Bell Operating Companies or other exchange carriers who always were independent of the AT&T system are connecting carriers, for the Court of Appeals correctly ruled that Sections 201 through 205 of the Act authorized the Commission to require connecting carriers to impose access charges. Under Section 2(b), Sections 201 to 205 of the Act expressly apply to the carriers that Section 2(b)(2) covers, except as otherwise provided in those sections. Section 205(a) specifically authorizes the Commission to prescribe just and reasonable charges for "any carrier or carriers" whose charges are found not to be just and reasonable or otherwise in violation of the Act. The Commission made just such findings as to the interstate rate structures existing prior to its access charge decision [23] and has now acted to establish guidelines for lawful rate structures.[24] Nothing in Section 205(a) exempts connecting carriers from this authority.[25]

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[23] *See Third Report and Order*, 93 F.C.C.2d at 256-58.

[24] *Cf. Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (holding Commission had authority to prescribe rates for and require tariff filings by connecting carrier under Section 4(i) of the Act, 47 U.S.C. § 154(i)).

[25] As the Court of Appeals ruled, 737 F.2d at 1115 n.23, although Section 203 exempts connecting carriers from the ministerial task of filing tariffs with the Commission, because the Section 203 filings of a non-connecting carrier show "all charges for itself and its con-

Thus, although the reach of Sections 201 through 205 is not limitless, only a very niggardly reading of those sections allows the view that end user access charges cannot be imposed pursuant to them.[26] Numerous Supreme Court and court of appeals decisions make it clear, however, that the provisions of the Communications Act, including Sections 201 to 205, are not to be construed so narrowly.[27]

C. The Commission's Actions Have Not Preempted any State Jurisdiction.

Petitioners struggle to pump significance into this case with the claim that because no incompatible state action is involved here, the Commission has improperly pre-

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necting carriers," it does not follow that a connecting carrier's tariffs are not subject to Commission review, let alone that connecting carriers are not not subject to Section 205(a).

[26] The Commission's ratemaking jurisdiction over connecting carriers under Sections 201 to 205 also lays to rest the view that connecting carriers, particularly after the AT&T consent decree, are no longer subject to the jurisdictional cost allocation required under *Smith v. Illinois Bell Telephone Co.* *See* Wis. Pet. at 13. Indeed, *Smith* itself is a refutation of that view, for it plainly holds that local plant is used, in part, to provide interstate service. Nothing in Section 2(b)(2) or the AT&T decree changes this jurisdictional fact.

[27] *See NCUC I*, 537 F.2d at 792, 793 (Section 2(b) does not "sanction[] any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 736 (2d Cir. 1973) (upholding Commission action prohibiting connecting carriers from engaging in data processing business on basis of Sections 201 to 205, except through separate subsidiaries). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (declining to "construe the Act so restrictively" as to preclude Commission jurisdiction over cable television systems because such systems were located entirely within state boundaries).

empted state jurisdiction.[28] In so doing, Petitioners could not have erected a better strawman, for in point of fact there has been no preemption. The absence of incompatible state action reflects precisely this state of affairs. Indeed, given this absence of incompatible state regulation, one is left all the more to wonder just how it is that Petitioners believe the Commission has intruded upon jurisdiction reserved to the states.

There is plainly no basis for any claim that the Commission has preempted state jurisdiction. The states continue to have complete discretion to determine the charges for recovering costs allocated to intrastate service pursuant to *Smith* and to determine on whom those charges will be imposed. Petitioners, moreover, point to no state order or regulation that the Commission has preempted. Nor do the Commission's access charge orders anywhere declare that state authority is being preempted.[29]

At best, therefore, the "preemption" Petitioners claim is the imposition of access charges on "their ratepayers," meaning, presumably, local exchange subscribers.[30] As discussed above, however, this claim merely begs the question of which persons are responsible for interstate costs and on whom, therefore, charges for the recovery of such costs may be imposed. Ultimately, it fails to recognize that one person may be subject to multiple jurisdictions and, therefore, multiple charges.

In short, the jurisdictional claims that are at the core of Petitioners' challenge to the Commission's access charge decision do not merit review here, any more than did similar jurisdictional claims in *NCUC I* and *II* and *Com-*

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[28] N.Y. Pet. at 15-16.

[29] The Commission, in fact, has stated quite the contrary. *See Third Report and Order*, 93 F.C.C.2d at 260.

[30] N.Y. Pet. at 13.

puter II, where this Court also declined review. The Commission's decision does not raise any novel legal question about the correct construction of the Communications Act's division of federal and state authority. Instead, the decision is in keeping with an increasingly lengthy line of decisions construing the Act to authorize Commission regulation of interstate matters, notwithstanding the impact of that regulation on intrastate concerns. *See NCUC I* and *II* and *Computer II*.

III. The Decision Below Correctly Determined That the Commission's Access Charge Decision Was a Reasonable and Adequately Based Exercise of Agency Authority.

Petitioners contend that the Commission's access charge decision is arbitrary and, therefore, a violation of the Communications Act and "equal protection for the consuming public."[31] The Court of Appeals noted, however, that the problem the Commission addressed was very much predictive in nature.[32] "'[P]ure factual determinations,'" therefore, were not required to support the Commission's actions.[33] The court also noted "the leeway the FCC has to make 'deductions based on [its] expert knowledge.'"[34] Accordingly, after carefully examining the

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[31] Fla. Pet. at 22-26. Because Petitioners here challenge federal action regulating economic matters, their claim—whether tested under the Act or the Constitution—presumably is not and, in any case, could not legally be any more than the proposition that the Commission has acted arbitrarily or unreasonably in requiring an access charge for telephone subscribers. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77 (1981); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970); *Associated Press v. FCC*, 452 F.2d 1290, 1299-1302 (D.C. Cir. 1969) (separate rates for press tested under Act by arbitrary and unreasonable standard).

[32] 737 F.2d at 1117-18.

[33] *Id.* at 1117, quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

[34] 737 F.2d at 1117, quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

Commission's decision, the court ruled that the Commission's assessment of the bypass risk was adequately supported and that its decision to address the risk by requiring an end user access charge was not unreasonable.[35]

In reviewing the Commission's determinations, therefore, the court below plainly applied the proper legal standard for reviewing agency action. Petitioners do not challenge the standard applied.[36] Nor does anything Petitioners raise here suggest the standard failed in the court's application of it.

Petitioners first contend that the end user access charge is regressive and, therefore, does not ensure universal service. Whether or not the access charge is regressive, however, the issue of whether the Commission had appropriately treated relief for end users unable to pay any access charge was not before the Court of Appeals because the Commission had deferred the matter to future proceedings.[37] In any case, that the burden of a uniform

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[35] 737 F.2d at 1117.

[36] The applicable standard of review, of course, requires that the agency's action not be arbitrary or unreasonable, but in problems predictive in nature, neither definitive analysis nor pure factual determinations are required to support the action. *See FCC v. WNCN Listeners Guild*, 450 U.S. at 594; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 814; *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). *See also United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972) ("we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported").

[37] 737 F.2d at 1117. Section 4(j) of the Communications Act, 47 U.S.C. § 154(j), gives the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . ." *See Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC decision to approve a rate of return for AT&T at the completion of the first phase of a two-phase investigation, even though a related issue as

charge falls unevenly on subscribers does not make it unreasonable or discriminatory.[38]

The access charge scheme is also not unreasonable or discriminatory because of its uniform nationwide nature. The uniformity results from the Commission's desire to permit a gradual adjustment instead of immediately requiring an access charge based on interstate NTS costs allocated entirely to end users. Thus, in all areas, the initial residential and single line business charge of two dollars is well below the charge that would result from an allocation of all interstate NTS costs to end user access charges.[39] The multi-line business charge of $6 is below the latter in nearly all areas and below the national interstate cost average of seven dollars per subscriber line.[40]

That the initial access charge will cause a greater percentage overall rate increase in some areas than in others merely reflects the pre-existing differences in costs for local telephone service around the country. In addition,

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to the earnings of AT&T's manufacturing subsidiary, Western Electric, remained to be determined in phase two of the investigation). A court may not direct the Commission to order its docket and consider cases with any particular priority. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *but cf. Telecommunications Research and Action Center v. FCC*, slip op. (D.C. Cir. No. 84-1035 October 24, 1984).

[38] *See Dandridge v. Williams*, 397 U.S. at 485-86 (welfare benefits granted without reference to family size not unlawfully discriminatory).

[39] The two dollar charge was established by the orders under review. The Commission, however, recently reduced this charge to one dollar. See discussion, *infra*, p. 25 n.45.

[40] The business line charge is actually less than $6 dollars in many areas because the Commission's access charge rules temporarily establish a ceiling on all charges that should be somewhere between four and six dollars. *See Reconsideration Order*, 48 Fed. Reg. at 42989 n.22. Indeed, in the tariffs that actually have been filed by Bell Operating Company Respondents, the charges nationwide range from $2.78 to the six dollar maximum.

access charge uniformity will continue because of the Commission's decision to help preserve universal service through nationwide averaging and by recovering any area's above average NTS costs through carrier access charges rather than end user charges.

Finally, Petitioners' claims that the access charge encourages bypass and will as a result leave investment in exchange plant stranded, increasing the cost of telephone service, is flatly contradicted by the Commission's determinations on this point after its own careful study and findings. Petitioners, therefore, would have the court below and ultimately this Court substitute their judgment for the Commission's. This is plainly beyond the scope of appellate review.[41]

In short, therefore, there is nothing unreasonable or discriminatory about the end user access charge. Rather, the charge is the product of Commission efforts to accommodate competing objectives, all of which are within the public interest that the Commission is charged with advancing.[42]

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[41] *See Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (even though the reviewing court's "inquiry into the facts is to be searching and careful," in assessing whether the agency's action is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " "[t]he court is not empowered to substitute its judgment for that of the agency"); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) (in reviewing agency's selection of cost allocation principles for ratemaking purposes, court may only review reasonableness of decision but not substitute its judgment for agency's).

[42] *See MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 415-16 (D.C. Cir. 1982) (" 'political' " nature of cost allocation method selected by agency for ratemaking purposes was not invalid for that reason because "there is no purely economic method of allocation" where "elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made").

IV. Petitioners Seek a Redefinition of the Jurisdictional Division Between the Commission and the States That Is a Legislative Matter Not Suitable for Judicial Review.

The Court of Appeals has already reviewed the Commission's actions, correctly applying the applicable standards of review. Moreover, the questions of law presented to it concerning the Commission's jurisdiction have already been resolved in several prior court of appeals decisions without need for review here. Consistently with those decisions, the court below correctly ruled that the Commission did not exceed its jurisdiction in requiring end user access charges. There is, therefore, nothing new for review here.

Indeed, this controversy, at bottom, does not really involve legal questions concerning construction of the Communications Act. Instead, it reflects the states' disagreement with the manner in which Congress has divided jurisdiction to regulate telephone service. This dispute has its origin with the early requirement that local exchange costs be allocated between those attributable to providing interstate service and those attributable to providing intrastate service. *See Smith v. Illinois Bell Telephone Co., supra.* Then Congress, in enacting the Communications Act, continued to leave recovery of interstate costs under federal jurisdiction.

This division of responsibility sowed the seeds for inevitable tension between the state and federal jurisdictions. The recovery of exchange costs depends on imposing charges for various services at levels which will not so dampen telephone subscribership or usage as to result in a shortfall of the revenues required to cover costs. Consequently, state decisions to impose charges on certain persons for the recovery of intrastate costs practically constrain Commission decisions to impose additional

charges for the recovery of interstate costs on the same persons, and conversely.[43]

Petitioners' claims here that certain categories of persons are not subject to interstate charges, even though interstate costs are incurred for their benefit, are, therefore, ultimately an effort to revisit and resolve through judicial review the division of jurisdiction Congress legislatively confirmed with the Communications Act and the tensions inherent in that division.[44] Whether or not there should be some readjustment of jurisdiction to alleviate these difficulties, it is not an appropriate judicial undertaking but a legislative task involving competing matters of economic policy, national communications policy and state, federal and consumer interests.[45]

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[43] As one Petitioner notes (Fla. Pet. at 8): "The system seems straight-forward enough, and it would be if the [telephone] companies' activities were exclusively within the province of one jurisdiction."

[44] *See, e.g.*, Fla. Pet. at 26: "The states . . . believe that they are in a better position to set rate structures on a local basis carrying out the national policy of protecting universal service."

[45] *Cf. American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571, 586-89 n.16 (1968) ("This Court is not particularly suited to pass on the merits of the economic arguments made by the railroads' expert witnesses in these cases . . . . Our discussion here . . . is merely intended to illustrate the desirability of having the initial resolution of these issues made by a tribunal, and in a proceeding, more suitable than the present one"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940) ("To a large degree [modern administrative tribunals] have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could [not] effectively be exercised directly . . . by the judicial process").

Indeed, the statutory devices for accommodating the competing interests are in place and functioning. Thus, as a result of the state and federal Joint Board procedures established in Section 410 of the Act, the Commission now has considered and adopted a Joint Board recommendation to reduce the residential and single line business access charge from two dollars to one. *See* Communications Daily, Dec. 20, 1984, at 1.

The Court of Appeals correctly determined that the Commission did not exceed its jurisdiction and that the Commission's access charge decision was adequately supported and reasonable. Insofar as this Court is concerned, that should be the end of the matter. No review here, therefore, is warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petitions in Nos. 84-816, 84-824 and 84-856 and not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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Nos. 84-816, 84-824, 84-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA, *et al.*,
Respondents.
(and two related petitions)

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in Cincinnati Bell Inc., which has outstanding securities in the hands of the public.[1]

[1] Counsel for AT&T understand Rule 28.1 to require disclosure of only those subsidiaries or affiliates with outstanding securities in the hands of the public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-816, 84-824, 84-856

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
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v.

FEDERAL COMMUNICATIONS COMMISSION
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(and two related petitions)

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petitions for certiorari filed by the Public Service Commission of Wisconsin, the State of Michigan, and the Michigan Public Service Commission (No. 84-816); the Florida Public Service Commission

(No. 84-824); and the New York State Department of Public Service (No. 84-856). The petitions seek review of the same judgment of the Court of Appeals. See Sup. Ct. R. 19.4.

STATEMENT OF THE CASE

In these three petitions for certiorari, four states join the National Association of Regulatory Utility Commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA") in seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1] That judgment upheld, in all but minor respects, the FCC's access charge plan—a series of FCC orders establishing a new rate structure for interstate rates to recover the interstate costs of local telephone companies in originating and terminating interstate calls. See Pet. App. 27a-32a.[2]

The pertinent factual background, and the nature of the FCC's access charge plan, are set forth in AT&T's brief in opposition to NARUC's petition in No. 84-95; to avoid repetition, that statement is incorporated by reference here. However, it may be useful to the Court for this opposition to identify clearly the aspects of the access charge plan assailed by all five petitions; to relate the claims made in the various petitions to one another; and to apprise the Court of supplementary proceedings at the FCC following the access charge plan orders that the petitions seek to have reviewed on certiorari.

Under the FCC's access charge plan, local telephone companies are compensated for their interstate costs through a range of interstate charges. These include

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[1] NARUC's petition was filed in July 1984 (*NARUC* v. *FCC*, No. 84-95); NASUCA's petition was filed in September 1984 (*NASUCA* v. *FCC*, No. 84-504). AT&T has filed oppositions in both cases.

[2] "Pet. App." refers to Appendix A to NARUC's petition in No. 84-95.

charges to interexchange companies like AT&T, who require switching and other services from the local companies, and charges to end users who employ the same local company facilities to access both the exchange and interstate networks. In general, the access charge plan does not fix the individual charges but rather determines the structure of the interstate rates that the local companies are to file with the FCC. When filed, those charges are themselves subject to agency review.

Pursuant to the access charge plan orders, certain of the charges contemplated by the FCC have gone into effect [3] and are currently under review in pending Commission proceedings.[4] The structure for other charges, including the fixed end user charges for single-line businesses and for residential service, is still being developed in FCC proceedings that are not yet completed.[5] When those rate structure proceedings are completed, the additional charges will be reflected in tariffs that will themselves be subject to review by the FCC and ultimately review in the courts.

In the Court of Appeals, a wide array of attacks was made on the access charge plan by numerous petitioners or intervenors including carriers, end users, and states. All of the central criticisms were rejected in an extraordinarily

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[3] End user charges for multiline business customers, which may not exceed $6 per month, went into effect in May 1984, as did various charges paid by interexchange carriers.

[4] *Investigation of Access and Divestiture Related Tariffs*, FCC Docket No. 83-1145.

[5] Tariffs setting end user charges for residential customers and single-line businesses will not be filed until next year. A recently adopted FCC order establishes a general ceiling on per-line charges for residential users of $1 per month at the outset (rising to $2 in June 1986), subject to variations adapted to local circumstances and an exemption mechanism for customers who cannot afford such payments. *In re MTS and WATS Market Structure*, FCC Docket No. 78-72, adopted Dec. 19, 1984. This order not been reviewed by the Court of Appeals and is not the subject of any of the pending petitions.

thorough and detailed decision by the Court of Appeals. Pet. App. 1a-110a. In this Court, only five certiorari petitions have been filed, and all of them are addressed to only one aspect of the FCC's multifaceted access charge plan: the use of fixed interstate end user charges to recover a portion of the interstate costs of local telephone companies assigned to the interstate jurisdiction.

From the outset, the principal challenge by the states to the end user charges has been a claim that they are precluded by this Court's decision in *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930), and by the "intrastate service" exemption of Section 2(b)(1) of the Communications Act, 47 U.S.C. § 152(b)(1). Those contentions were answered in AT&T's brief in opposition in No. 84-95; and, so far as the new petitions addressed in this opposition repeat those arguments, AT&T's brief in No. 84-95 is adopted by cross-reference.[6] The NASUCA certiorari petition in No. 84-504 raised a procedural claim—that oral hearings were required for the access charge plan—which AT&T answered in its opposition in No. 84-504 and which is not repeated by any of the new petitions.

The new certiorari petitions appear to raise three new sets of arguments. First, the Wisconsin-Michigan petition, supported in part by the New York petition, argues that the interstate access charges violate the "connecting carrier" exemption of Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2). Next, the Florida petition contends that the end user charge is unlawfully discriminatory and is in any event unwise as a matter of

[6] The *Smith* argument, principally relied upon by NARUC, is undercut by the Wisconsin-Michigan certiorari petition. That petition appears to argue that the lower court read *Smith* correctly but that *Smith* itself "ceased to have controlling authority under the Communications Act" as a result of the Bell System divestiture. Pet. 12-13. See pp. 13-14, below.

policy. Finally, the Wisconsin-Michigan petition, supported by the New York petition, asserts that the pendency of a number of other cases involving different disputes over FCC authority supports certiorari in this case.

SUMMARY OF ARGUMENT

The certiorari petitions filed by Wisconsin-Michigan and by New York make a new claim: that the FCC lacked jurisdiction to require fixed interstate end user charges to recover interstate costs. Both argue that such end user charges are prohibited by Section 2(b)(2) of the Communications Act, 47 U.S.C. § 152(b)(2), limiting FCC jurisdiction over so-called "connecting carriers." However, an explicit proviso in Section 2(b)(2) makes clear that, even as to connecting carriers, the FCC retains jurisdiction to require reasonable interstate rates. Accordingly, Section 2(b)(2) is no bar to the end user charges, whether or not individual local telephone companies are deemed to be connecting carriers.

Florida, unlike the other petitioners, challenges the merits of the end user charges, but its claims do not warrant certiorari. The FCC amply supported the determinations and findings that are challenged by Florida, and no claim of conflict between the circuits has been or could be made concerning the merits of the plan. Finally, the Wisconsin-Michigan and New York petitions assert that a number of *other* pending or prospective cases in this Court involve questions of FCC authority; but the prospect or possibility of review by this Court of other issues of FCC authority, not presented by the access charge plan or the decision below affirming it, provides no reason for review in this case.

ARGUMENT

I. The Use of Interstate End User Charges To Recover Interstate Costs Does Not Violate Section 2(b)(2) of the Communications Act.

In several respects, the new petitions challenge the FCC's authority to set fixed end user charges by repeating arguments made in the NARUC certiorari petition and already answered in AT&T's brief in opposition.[7] However, two of the petitions—Wisconsin-Michigan (Pet. 12-13) and New York (Pet. 7-8)—do offer one new jurisdictional argument. They claim that Section 2(b)(2) of the Communications Act, limiting FCC authority over "connecting carriers,"[8] forbids the FCC from requiring such carriers to set interstate end user charges; and in particular these states argue that this limitation curtails the FCC's power to mandate such charges for the former Bell System Operating Companies ("BOCs") which the states contend are now "connecting carriers" as a result of their divestiture from AT&T.

As the Court of Appeals observed (Pet. App. 43a-44a, n.23), the answer to this argument is provided by the explicit language of Section 2(b)'s final proviso.

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[7] These claims include NARUC's argument that the charges violate Section 2(b)(1) of the Act because they are allegedly charges for "local" service (answered at AT&T's brief in opposition in No. 84-95 at pp. 8-11), and NARUC's argument that such charges violate Section 221(b) of the Act, 47 U.S.C. § 221(b) (answered at AT&T's brief at p. 8 n.8).

[8] Section 2(b)(2) provides, with qualifications not here relevant, that the Act does not apply to or give the FCC jurisdiction over a carrier "engaged in interstate . . . communications solely through physical connection with the facilities of another carrier," "except that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such] . . . carriers." Elsewhere the Act classifies such Section 2(b)(2) carriers as "connecting carriers." Section 3(u), 47 U.S.C. § 153(u).

Although Section 2(b)(2) does in certain respects restrict FCC authority over connecting carriers, Section 2(b) concludes by providing "that sections 201 to 205 of [the Act] shall, except as otherwise provided therein, apply to [such connecting] . . . carriers." See p. 6, n.8, above. In other words, connecting carriers are not automatically subject to a variety of ancillary provisions of the Act, but they continue to be subject to most of the core requirements of Sections 201-05, 47 U.S.C. §§ 201-05, *including* the power of the FCC to order them to charge reasonable rates under Section 205(a) of the Act, 47 U.S.C. § 205(a).[9]

The FCC's determination of the interstate rate structure, including fixed interstate end user charges, is an exercise of the FCC's authority under Section 205(a) of the Act. Pet. App. 43a-44a, n.23. Whether or not an individual telephone company is classified as a connecting carrier is irrelevant because, under Section 2(b)'s proviso, the FCC retains power over such carriers to require them to establish reasonable interstate rates. There is no conflict on this issue with the decision of any other court.

The petitions argue that connecting carriers are exempt from the requirement of Section 203(a), 47 U.S.C. § 203(a), that charges for interstate service be reflected in tariffs filed with the FCC. This provision shifts the mechanical obligation to file tariffs covering a connecting carrier by requiring that the interstate carrier with which the connecting carrier connects shall file tariffs reflecting charges for itself "and its connecting carriers" for interstate service. Section 203(a). It does not qualify the FCC's power under Section 205(a) to require *all* carriers,

[9] Section 205(a) implements the requirements of Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a), that interstate rates be just, reasonable, and not unreasonably discriminatory. None of these provisions contains any internal exemption excluding connecting carriers from their requirements.

including connecting carriers, to maintain interstate rates that are reasonable and not unreasonably discriminatory. Thus, even if Section 203(a) precluded the FCC from requiring tariff filings by connecting carriers—which it does not—those carriers would still have to employ the fixed end user charges that the FCC has found to be appropriate under Section 205(a).[10]

Furthermore, the District of Columbia Circuit ruled in an earlier case that the FCC does have discretionary authority to require connecting carriers to file tariffs for interstate services. Even though Section 203(a) does not automatically command such filings by connecting carriers, the FCC has been held to have general authority to require such carriers to file tariffs for interstate services.[11] No conflict exists with respect to the power of the FCC, on a discretionary basis, to require the filing of tariffs by all local telephone companies where interstate services are involved.

In sum, the FCC clearly has authority under the Act to establish interstate end user charges to be collected by local telephone companies even if it is assumed that some individual companies are connecting carriers under Section 2(b)(2). The "connecting carrier" exemption relied on by the new petitions, like the "intrastate service" exemption relied on by NARUC, is irrelevant to this case. The FCC's exercise of its authority over interstate rates is consistent with the language of the Act and all existing case law, and the issue of FCC authority is plainly not one on which certiorari is warranted.

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[10] Because all carriers are subject to Section 205(a), the FCC had no occasion to determine in this case the "connecting carrier" status of any local telephone company, nor did the lower court address that subject.

[11] *Lincoln Tel. & Tel. Co.* v. *FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (construing Section 4(i) of the Communications Act, 47 U.S.C. § 154(i)). Section 203(a) does not forbid the FCC to require the filing of tariffs by connecting carriers; it merely exempts them from an automatic statutory filing requirement.

II. Florida's Attacks on the Merits of the Fixed End User Charges Do Not Merit Certiorari.

In its petition, Florida makes two attacks on the merits of the fixed interstate end user charges. Although it now argues that the end user charges are discriminatory, Florida did not make this argument in the lower court and the Court of Appeals did not pass upon it. Florida did argue below that the use of flat end user charges threatened universal service and the lower court correctly rejected that argument. Neither contention presents any conflict in the circuits or otherwise warrants certiorari.

Florida's first claim is that the use of a uniform end user access charge is "discriminatory" because the actual interstate non-traffic sensitive costs, covered in part by such charges, vary from place to place. From this premise, Florida argues that the fixed end user charges therefore bear "no relationship to actual cost" (Pet. 17) and concludes that the charges therefore constitute forbidden discrimination in rates under Section 202(a). *Id.* Florida is incorrect as to both its description of the end user charge and the law governing discrimination under the Communications Act.

As the Court of Appeals made clear, there is no statutory requirement that every charge reflect the precise cost of the individual user. *E.g.*, Pet. App. 59a, 83a, 92a. On the contrary, "averaged" charges have been utilized for years in telephone rate making even though the precise cost of providing a service to an individual customer may vary for virtually every customer. Merely as an example, many jurisdictions have used flat monthly exchange charges for local residential service; but the cost of serving each individual customer varies significantly depending on distance of the house from the central office, the number of local calls made each month, and several other factors. Under Florida's theory, all such flat local charges would constitute unreasonable discrimination.

In any event, Florida is wrong in suggesting that the end user charges are required to be uniform under the FCC's access charge plan: The agency is establishing *caps* for different classes of end user charges. Within the framework of the rate structure established by the FCC, the end user charges filed by different companies can and do vary from area to area. Indeed, the end user charges in different jurisdictions for multiline businesses range from under $3 up to the $6 ceiling. Similarly, the recently adopted proposals for residential charges would permit local variations. See p. 3, n.5, above. The lawfulness of individual charges is not at issue in this case,[12] but these facts refute Florida's repeated intimation that end user charges have been designed as a regulatory straitjacket permitting no latitude or variation.

Apart from its claim of discrimination, Florida argues that fixed end user charges undermine the goals that the FCC sought to achieve. Pet. 22-26. Florida asserts that the charges, because they are fixed, are "regressive" and will necessarily undermine the FCC's goal of universal service (*id.* at 22-23); that the charges, by driving poor customers off the network, will drive up the cost that must be borne by heavy users, thus encouraging them to bypass the network and utilize less expensive alternatives (*id.* at 23-24); and that the result will be to "idle[ ] the system and encourage inefficiency." *Id.* at 24-25. These claims are unfounded.

The notion that fixed end user charges will encourage bypass has the matter backwards. The FCC demonstrated, in findings affirmed by the Court of Appeals, that the end user charges ultimately reduce the costs currently

[12] As noted, individual charges within the framework of the access charge plan are embodied in tariff filings which are open to challenge in conventional tariff proceedings under the Act. See, *e.g.*, p. 3 & n.5, above.

borne by heavy users who did not cause those costs; and this reduction in the costs that must be recovered through interstate per minute rates paid by heavy users will reduce their incentive to bypass the network. Pet. App. 44a-50a. These findings are amply supported by the evidence (*id.*), but even if they were debatable, this Court does not normally grant certiorari to review agency fact findings which do not, and indeed could not, present any conflict of law between the circuits.

Florida may be arguing in the alternative that fixed end user charges, alleged to be "regressive," would bear heavily upon poor residential customers. The FCC has met this contention. Although it has found presumptively that cost causers should bear their own costs, the FCC has deferred end user charges for *all* residential customers until it has completed its current proceedings to devise exemptions for customers who could not afford even the minimal contribution now contemplated for residential customers. Florida cannot now complain in this Court about the design of such exemptions because that subject is still before the FCC in proceedings now being completed. See p. 3, n.5, above.

III. The Pendency of Other Disputes Over FCC Authority Does Not Support Certiorari Here.

The Wisconsin-Michigan and New York petitions cite a series of cases involving disputes over FCC authority, and they urge that the pendency of those cases warrants certiorari here. None of these cases presents the issues that are involved in this case and, whatever the basis for review in the cited cases, they cannot support certiorari here.

First, the recent decision of the Fourth Circuit, to which both the Wisconsin-Michigan and the New York petitions refer, has nothing whatever to do with access

charges.[13] The Fourth Circuit there affirmed a decision of the FCC involving depreciation of telephone plant. Specifically, the FCC ruled that, after it established methods of computing depreciation for telephone plant used interchangeably for interstate and intrastate service, the states could not ignore the FCC's determinations and require that the same property be depreciated on a different basis in state ratemaking proceedings.

The FCC's authority to determine depreciation rates and methods is conferred by Section 220 of the Communications Act, 47 U.S.C. § 220, which specifically empowers the FCC to establish binding depreciation rates and methods. The access charge decision does not depend on Section 220 or involve any conflict between federal and state methods of computing depreciation. The FCC here was concerned solely with structuring interstate rates to recover interstate costs in a manner consistent with federal policy goals. Nothing in the efforts of state parties to obtain review of the Fourth Circuit decision provides a basis for or supports certiorari in this case.

Second, the Wisconsin-Michigan petition refers to another controversy, now the subject of certiorari petitions or appeals in this Court, involving yet another, quite distinct issue. Pet. 8. That issue is whether FCC orders issued in rulemaking proceedings are enforceable in District Courts under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), or whether such District Court enforcement actions are restricted to adjudicatory orders. There is in fact a conflict on this issue of District Court

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[13] *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), *appeal pending*, No. 84-871, *and petition for certiorari pending*, No. 84-889.

enforcement authority between the First and Fifth Circuits,[14] and it may be this Court will conclude that this conflict justifies review.

However, the possibility of a grant of review of the First or Fifth Circuit decision on the Section 401(b) issue does not provide any basis for an argument that this Court should review the access charge decision by the District of Columbia Circuit. The conflict between the First and Fifth Circuits relates solely to the enforcement regime to be used in implementing valid FCC orders. That issue turns on the construction of Section 401(b) of the Act and the policies relevant to enforcement of agency orders. No enforcement question is presented in the present access charge case.[15]

Finally, Wisconsin-Michigan urge that certiorari should be granted to gauge the "impact" of the divestiture decree in the AT&T antitrust case[16] on the "correct apportionment of regulatory jurisdiction between federal and state authorities." Pet. 5, 12-13. See also New York Pet. 4. However, the petitions offer only one clearly articulated argument to connect the divestiture decree with the access charge decision, namely, the claim that the divestiture decree has converted the BOCs into connecting carriers under Section 2(b)(2) of the Act. Even if this

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[14] Compare *New England Tel. & Tel. Co.* v. *Public Utilities Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for certiorari pending*, No. 84-900, with *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870.

[15] Two other cases involving enforcement are cited by the Wisconsin-Michigan petition: *Cincinnati Bell Telephone Co.* v. *PUC*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), *appeal pending*, No. 84-623, and *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483. Neither case involves access charges.

[16] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C.), *aff'd mem.*, 460 U.S. 1001 (1983).

were true, and neither the FCC nor any court has so ruled, it would be irrelevant to the validity of the access charge plan; as shown at pp. 6-7, above, the FCC clearly has power to require all local telephone companies, including connecting carriers, to use reasonable and non-discriminatory interstate charges to recover interstate costs.

If the states are arguing that the divestiture decree provides a basis for reexamining generally the FCC's authority over the BOCs, the argument misconceives the proper timing and occasion for such review. After an antitrust decree has been approved and affirmed by the courts, its construction thereafter is properly litigated in concrete contexts where resolution has a demonstrated effect on the outcome of an individual controversy. In this case, none of the challenges made by the states to the access charge plan requires the construction of the anti-trust decree; there was no construction of that decree by the court below; and no issue of construction is properly presented on certiorari in this case.

The petitioners' resort to unrelated cases involving FCC authority, as an asserted basis for review of the access charge plan, is a confession of the weakness of their petitions in this case. This Court does not grant certiorari because the agency is engaged in numerous cases; it requires a showing that, in the particular case for which certiorari is sought, there is a conflict among the circuits or some other recognized basis for Supreme Court review. No accepted basis for certiorari has been established in *this* case either by the original NARUC and NASUCA petitions or by the three additional petitions that are addressed in this opposition.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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Nos. 84-816, 84-824, and 84-856

In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case raises questions as to the validity of certain aspects of the FCC's end-user access charge plan, which provides for the recovery of a part of the cost of local telephone company equipment. A large portion of that equipment is used for both intrastate and interstate service; part of the cost of that equipment is "non-traffic-sensitive"—*i.e.*, it does not vary with the extent of use. The Commission has adopted a plan pursuant to which most of the portion of these non-traffic-sensitive costs that is allocated to the "interstate jurisdiction" ultimately will be recovered through a flat access fee payable by all telephone subscribers, without regard to whether they make interstate calls.

The questions presented are:

(1) Whether the Commission invaded the authority to set rates for intrastate service that is reserved to the states by the Communications Act.

(2) Whether the Commission's end-user access charge plan prescribes rates which are unlawfully discriminatory.

(3) Whether the Commission's end-user access charge plan will have an adverse effect on universal service that is impermissible under the Communications Act.*

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*All of the petitions to which we respond herein raise some aspect of Question 1, which also was presented by the petition in No. 84-95, *National Association of Regulatory Utility Commissioners* v. *FCC*. No. 84-95 also seeks review of the judgment of the court of appeals challenged here. In this brief we address only those aspects of Question 1 not addressed in our brief in opposition in No. 84-95. Petitioner Florida alone raises Questions 2 and 3.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 84-824

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 84-856

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE, PETITIONER

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (84-95 Pet. App. 1a-110a[1]) is reported at 737 F.2d 1095. The orders of the FCC are reported at 93 F.C.C.2d 241 (Report and Order), 48 Fed. Reg. 42984 (1983) (Order on Reconsideration), and 49 Fed. Reg. 7810 (1984) (Order on Further Reconsideration).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. A petition for rehearing was denied on August 23, 1984. The petitions for a writ of certiorari were filed on November 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case, like *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 84-95, and *National Association of State Utility Consumer Advocates* v. *FCC*, No. 84-504, arises from rulemaking proceedings undertaken by the Federal Communications Commission (FCC) to determine, inter alia, how local telephone companies should recover the "interstate" portion of the fixed costs of those local exchange facilities that may be used for both interstate and intrastate telephone service.[2] In the series of orders generally known collectively as the "*Access Decision*," the

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[1] Hereinafter "Pet. App." denotes the appendix to the petition for a writ of certiorari in the related case, No. 84-95. See page I note *, *supra*.

[2] The pertinent technical and regulatory background is described in the government's brief in opposition in No. 84-95. The procedures employed by the Commission in arriving at its *Access Decision* are described in our brief in opposition in No. 84-504 (at 2-3).

Commission endorsed a new system under which most of the interstate share of the costs of non-traffic-sensitive, jointly-used local exchange facilities ultimately will be recovered directly from telephone subscribers through fixed monthly charges.[3]

Numerous petitions for review of the Commission's *Access Decision*, raising a wide variety of claims, were filed in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed the agency's action in all but minor respects. Five petitions for certiorari have by now been filed in this Court. Those petitions challenge only that portion of the *Access Decision* which required the use of fixed end-user charges to recover the portion of the non-traffic-sensitive costs of local exchange equipment assigned, through the separations process, to the interstate jurisdiction.

ARGUMENT

1. Each of the most recent round of petitions urges that the access charge devised by the Commission to enable local exchange carriers to recover the interstate share of the non-traffic-sensitive costs of local exchange equipment used for both local and long-distance calls invades authority reserved to the states under the Com-

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[3] As we have explained in our response in No. 84-504 (at 2, 6-7), in the *Access Decision* the Commission did not actually approve tariffs or fix rates. Rather, it devised a framework for the recovery of the interstate share of the fixed cost of local exchange facilities. Pursuant to the *Access Decision*, local telephone companies will eventually be required to file tariffs specifying the rates they will charge for access to interstate service. At present, only tariffs setting rates for multi-line business customers need be filed; but beginning in June 1985, the FCC will require the filing of tariffs specifying end-user charges for other customers. Developments in this area subsequent to the conclusion of the proceedings below in this case are described at page 8 note 11, *infra*.

munications Act or by this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[4] Similar contentions were advanced in Nos. 84-95 and 84-504; these are addressed in our response in No. 84-95 (at 6-11). This response is confined to matters not addressed in our previous response. The issue framed by petitioners in No. 84-816 [hereinafter "Wisconsin"] and petitioner in No. 84-856 [hereinafter "New York"] is a permutation of the issue previously addressed. These petitioners contend that, in the aftermath of the divestiture decree separating the former Bell Operating Companies from the American Telephone and Telegraph Company, the operating companies have assumed the status of "connecting carriers" for purposes of the Communications Act, 47 U.S.C. 151 *et seq*. Under Section 2(b) of the Communications Act, 47 U.S.C. 152(b), the authority of the FCC is in some respects more limited with respect to connecting carriers than with respect to interstate carriers. Because the access charge system entails payment directly to local exchange companies of each subscriber's assessment for the interstate share of fixed local exchange costs, these petitioners contend that implementation of the access charge regime is beyond the Commission's authority.

This argument was correctly rejected by the court of appeals (Pet. App. 43a-44a n.23). Even if we assume arguendo that the former Bell Operating companies are now to be regarded as "connecting carriers" for purposes of the Communications Act,[5] it does not follow

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[4] See 84-816 Pet. 11-22; 84-824 Pet. 7-17; 84-856 Pet. 5-14.

[5] The FCC was not asked in the access charge proceeding to determine whether the divested Bell operating companies are connecting carriers within the meaning of the Communications Act. That question thus is not properly before this Court, and should not be considered in the first instance in a reviewing court. The question of the federal regulatory status of those divested companies is an important one that the FCC should con-

that the Commission was without authority to institute the access charge regime. To be sure, Section 2(b)(2) of the Communications Act on its face withholds from the Commission certain powers over connecting carriers that are not owned or controlled by interstate carriers. But the proviso to Section 2(b) makes clear that "sections 201 to 205 of [title 47] shall, except as otherwise provided therein, apply to carriers described" therein, including connecting carriers. Thus, the very statute on which these petitioners rely explicitly makes connecting carriers subject to the FCC's authority under Sections 201 through 205, 47 U.S.C. 201-205. Sections 201 through 205, the FCC's principal ratemaking statutes, provide ample authority for the Commission's imposition of end-user access charges to be paid to connecting carriers. As the court of appeals observed (Pet. App. 43a-44a n.23), while Section 203(a) of the Communications Act, 47 U.S.C. 203(a), does not *require* connecting carriers to file tariffs with the Commission,[6] under Sections 201, 202 and 205 their rates still must be just and reasonable.[7] "[N]othing in § 203 prevents the Commission from thus evaluating the charges of connecting carriers, finding them unlawful, and prescribing just and reasonable charges under § 205" (Pet. App.

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sider in the first instance. Its resolution turns in large part on factual determinations as to just what activities the divested Bell companies may engage in. The record in the access charge proceeding is not adequate to resolve the connecting carrier status question that California and New York seek to raise here.

[6] Section 203(a) requires carriers, "except connecting carriers," to file tariffs with the FCC. Connecting carriers traditionally have concurred in the tariffs filed by AT&T for interstate service, although they also have filed tariffs and tariff exceptions of their own where appropriate.

[7] Sections 201(b) and 202(a) require that rates be just and reasonable and not unreasonably discriminatory. Section 205(a) allows the Commission to enforce the provisions of Sections 201 and 202 and to prescribe lawful rates in the event the tariffs filed are unlawful.

43a-44a n.23). Moreover, in order to ensure that the rates charged by connecting carriers are not in violation of Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, the FCC has *discretion* to use its powers under Section 4(i), 47 U.S.C. 154(i), to require connecting carriers to file tariffs. See *Lincoln Telephone & Telegraph Co.* v. *FCC*, 659 F.2d 1092, 1108-1109 (D.C. Cir. 1981).[8] In sum, the Commission has the authority to impose flat access charges on end-users and to require carriers to implement those charges by filing tariffs with the federal agency. This is true regardless of whether the former Bell operating companies are deemed connecting carriers.[9]

2. Observing that nationally uniform access charges will impose a larger percentage incremental cost increase upon telephone subscribers in areas where local exchange service is comparatively inexpensive, petitioner Florida contends (84-824 Pet. 17-21) that the *Access Decision* fosters unlawful discrimination in rates in violation of 47 U.S.C. 202. The factual premise advanced by the state does not establish the legal conclusion tendered.

As Florida observes (84-824 Pet. 8-9), in determining local rates, state regulatory utility commissioners take

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[8] Section 4(i), 47 U.S.C. 154(i), provides, in relevant part, that the FCC may "issue such orders, not inconsistent with [the Act] as may be necessary in the execution of its functions."

[9] While the divested Bell operating companies collectively serve a majority of the nation's telephone subscribers, it is useful to bear in mind that the FCC's access decision also applies to some 1500 independent local companies that were not affiliated with AT&T at the time the decision was made. Thus, even if the divestiture had not occurred, the FCC's order would have been applicable to many companies that claimed to be connecting carriers. The court of appeals addressed the general question of the FCC's authority over connecting carriers, without special focus on the divested Bell companies, and found that authority to be adequate (Pet. App. 43a-44a n.23).

into account many factors, including the amount of the investment in equipment, operation and maintenance costs, and expected rate of return for investors. State regulators are also free to, and do, follow diverse policy orientations in ratemaking; the inevitable result is that local rate structures are not uniform among jurisdictions. Given this latitude for variation, it is also inevitable that a uniform flat access charge will not always constitute the same proportion of local exchange rates. But the mere existence of variation in these proportions from area to area does not establish that uniform access charges are discriminatory or that they are not cost based. Rather, the question whether access charges should be adjusted to reflect local costs is a policy decision committed to the Commission.

Averaging of charges on a nationwide basis is consistent with past practice in the telephone industry. For many years, long-distance charges have been averaged on a nationwide basis.[10] Similarly, most local telephone companies charge a flat fee for telephone service regardless of the distance between customer premises and the telephone company's central office, thereby effecting an averaging of rates. Under the argument advanced by Florida, such practices would be illegal.

Florida's contention with respect to averaging of rates is, in any event, premature. As we explained in No. 84-504 (at 2, 6-7), the *Access Decision* did not prescribe rates; rather, it prescribed a framework for the recovery of a large part of the interstate share of the

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[10] See *Domestic Communications-Satellite Facilities*, 35 F.C.C.2d 844, 856-869, on reconsideration, 38 F.C.C.2d 665, 692-697 (1972) (requiring carriers to bring Alaska and Hawaii into the uniform mileage rate pattern that obtains in the 48 contiguous states, "with all that such approach implies in terms of nationwide cost averaging and equalizations for interstate ratemaking proposes"). See also *Integration of Rates & Services*, 87 F.C.C.2d 20 (1981).

cost of local exchange facilities. Local telephone companies thus far have been at liberty to charge differing rates, so long as they did not exceed the cap applicable to a particular class of service. See 84-504 Gov't Br. in Opp. 7 n.6. If petitioners or other interested parties believe that rates set forth in tariffs now in effect are unjust, unreasonable or unreasonably discriminatory under Sections 201 and 202 of the Act, 47 U.S.C. 201 and 202, they may challenge those rates directly in an appropriate proceeding. If a carrier's tariff reflects rates that are determined to be illegal, the Commission may prescribe reasonable rates and award damages. See 47 U.S.C. 205, 206-209.[11]

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[11] In separate proceedings subsequent to those sought to be reviewed here, the Commission has now imposed more specific requirements with respect to the end-user charges. Initially, a joint federal-state board was commissioned pursuant to 47 U.S.C. 410, to prepare recommendations on access charge amounts, for a transitional plan for implementation of those charges, and for mechanisms to ease their impact on low-income customers and in high-cost areas. See *Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 18318 (1984). The joint board proposed specific implementation measures and measures to ease the impact of implementation on those users and those companies that were particularly vulnerable. *Recommended Decision and Order*, 49 Fed. Reg. 48325 (1984). At a public meeting on December 19, 1984, the FCC voted to adopt the recommendations of the joint board in all important respects. FCC News Report No. 18196 (Dec. 20, 1984).

Under the plan adopted, the end-user charge for residential and single-line business customers will be set at $1 per month beginning June 1985, and increase to $2 per month in June 1986. The plan provides mechanisms for state regulatory commissions to set standards for waiver of access charges for low income subscribers; and it asks the joint board to consider further refinements to meet the needs of high cost companies and possible creation of "lifeline" service options. The Commission's December 19 decision has yet to be formally released. When that occurs, any party aggrieved by the Commission's actions to implement the *Access Decision* may secure judicial review. 47 U.S.C.

3. Petitioner Florida contends (84-824 Pet. 23-26) that the Commission's *Access Decision* will not actually achieve the policy objectives espoused by the Commission, in particular the continued availability of universal service and prevention of "uneconomic bypass." As explained below, this contention is unfounded. In any event it plainly does not warrant further review; Florida's quarrel with the Commission's ruling rests at root upon a different view of sound policy (on a matter committed to the Commission's judgment) rather than any objective legal principle.

Florida's assertion that the *Access Decision* will undercut the objective of universal service betrays a serious misunderstanding of the causes of escalating telephone rates and the manner in which the Commission attempted to ameliorate that problem.[12] In framing its *Access Decision* the Commission determined that the practice of "bypass," fostered by the pricing structure in the telephone industry as it existed in the 1970s and early 1980s, was likely to jeopardize universal service.[13] This was because traditional long-distance toll rates were artificially high because of distortions created by the recovery of non-traffic-sensitive costs through usage-sensitive rates. The Commission determined that, because long-distance service available through bypass technologies was substantially—albeit artificially—cheaper, large communications users

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402(a); 28 U.S.C. 2341-2349. Plainly no such challenge may be made in this case.

[12] Section 151 does not mention "universal service" in terms. The Commission does not question, however, that universal service is one of the public interest goals it should seek to advance. See Pet. App. 51a-52a.

[13] "Bypass" denotes the use by communications users of alternative distribution technologies in place of the local exchange system to route their communications. Pet. App. 44a-50a.

would increasingly abandon the local exchange system unless the distortions in the existing rate structure were reduced or eliminated.[14] This would in turn force up rates for those users who chose, for economic reasons or otherwise, to remain on the local exchange system. The court of appeals concluded that the Commission had justifiably responded to the uneconomic bypass phenomenon (Pet. App. 49a):

> The FCC sufficiently established the existence of bypass as a real market force. It sufficiently established both (1) the inability of regulators, under a noncost-based pricing system, to determine accurately the economic efficiency or inefficiency of a given technology, and (2) the likelihood that market participants under such a system will exploit available bypass technology when they can reduce their costs by doing so.

Thus the access charge system was designed to discourage uneconomic bypass by eliminating distortions in the apportionment of long-distance costs.

Petitioner Florida's fears that the access charge regime will undercut universal service are particularly unwarranted because, in order to ensure that universal service is not endangered, the *Access Decision* contemplates the creation of a Universal Service Fund. Subscribers in high cost service areas will, to a limited extent, be subsidized by that Fund, which will be comprised of sums collected through usage-based charges

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[14] Contrary to Florida's assertions (84-824 Pet. 23), bypass presents a viable alternative only for the large-scale user. The initial cost of deploying bypass technology is substantial, and small users accordingly would not find bypass technologies economically viable. Thus, it is plainly incorrect to assert that the end-user charge encourages bypass. Whatever else might be said about the end-user charge, it was designed to *discourage* bypass by those who were likely to be able to take advantage of bypass opportunities. See Report and Order, 93 F.C.C.2d at 252-253, and App. F to the Report and Order (J.A. 1301 in the court of appeals record); see also Pet. App. 44a-50a.

to be imposed on long-distance carriers. See 84-95 Gov't Br. in Opp. 4 n.2.

In sum, the *Access Decision* was in large measure a reaction to well-founded concern that the old pricing structure in the telephone industry presented a real threat to universal service. While some may disagree on policy grounds with the means chosen by the Commission to preserve universal service, the Commission's choice is supported by the record. As the court of appeals observed (Pet. App. 52(a)):

> The Commission had record support for the view that a charge could be imposed without substantial negative effect on universal service.

In addition, the Commission has undertaken to monitor the results of its decision and to make appropriate changes if necessary to preserve universal service. At its December 19, 1984, public meeting (see page 8 note 11, *supra*) the Commission received a report from its staff on the effects of its recent actions (including the *Access Decision*) (Dec. 20, 1984). The Commission resolved to continue to monitor the effects of these actions on local rates and the number of subscribers.[15]

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[15] Amicus curiae Los Angeles contends (Br. 7-9) that the Commission extended access charges to Centrex-CO service without adequate support in the record for its decision. This argument was not raised by any of the petitioners and accordingly is not properly before the Court. In any event, the court of appeals correctly upheld the Commission's decision with respect to treatment of Centrex-CO service (Pet. App. 57a-64a). Briefly, through Centrex-CO service, a large institutional customer may use telephone company switches to create an internal switched network without the expense of on-premises switchboards or PBX equipment. The service requires the use of more subscriber lines than the customer would use if it provided its own switchboard. Los Angeles' argument is that application of the flat per-line charge to each Centrex-CO line may result in making this service prohibitively expensive. The court of appeals determined that the record supports the Commission's determi-

4. Petitioners Wisconsin and New York also assert that further review is warranted here because of the pendency of other cases involving the exercise of FCC jurisdiction over telephone companies. 84-816 Pet. 4-11; 84-856 Pet. 14-16. The cases cited by Wisconsin and New York involve issues entirely distinct from the issues presented by the *Access Decision*. Those cases concern: (1) the preemptive effect of FCC depreciation policies and rates applicable to telephone plant equipment that is used indivisibly for intrastate and interstate service (*e.g.*, *Virginia State Corp. Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984), appeal and petition for cert. pending, Nos. 84-871, 84-889); and (2) whether an FCC preemption order arising from rulemaking proceedings is enforceable in district court (*e.g.*, *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 74. F.2d 1 (1st Cir. 1984), petition for cert. pending, No 84-900; *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), appeal pending, No 84-870). Nor is there merit to petitioners' contention that this Court should consider the impact of the divestiture decree in *United States* v. *AT & T*, 552 F. Supp. 131 (D.D.C.), aff'd, 460 U.S. 1001 (1983), on "the correct apportionment of regulatory jurisdiction between federal and state authorities." 84-816 Pet. 5, 12-13; 84-856 Pet. 7. It plainly is not the role of the courts to undertake to revise or reconsider allocations of regulatory jurisdiction so as to accommodate the divestiture. If there is a need to consider the "impact" of the divestiture on the apportionment of regulatory jurisdiction, Congress is the appropriate body to perform that task. See 84-95 Gov't Br. in Opp. 12-13 & n.5. The only question properly

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nation that Centrex-CO lines generate costs comparable to other subscriber lines, and that the FCC had taken reasonable measures to soften the impact of the new charges on Centrex-CO users (*ibid.*).

before this Court on these petitions is the lawfulness of the FCC's end-user access charges, and that question does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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